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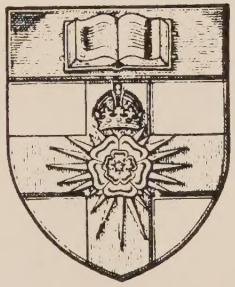

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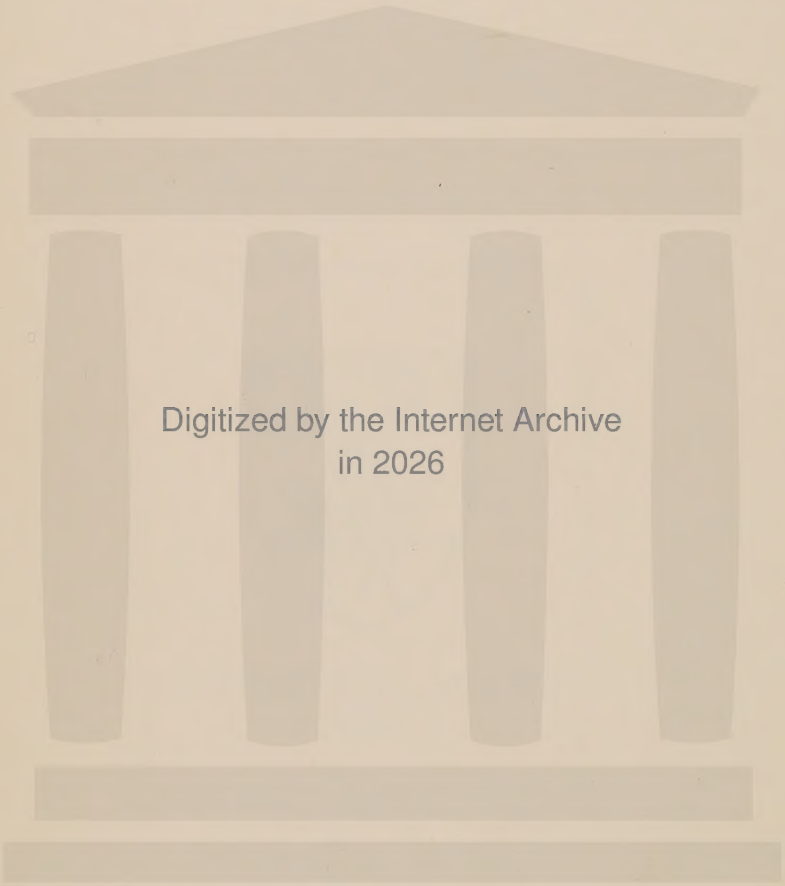
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THE HOUSE OF LORDS

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JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

ALSO

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A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Abbott, McGibbon *v.* – P. C.	653
Anderson, Tritton, & Co. *v.* Ocean Steamship Company H. L. (E.)	107
Apollo Candle Company, Powell *v.* – – – – P. C.	282
Attorney-General for Quebec *v.* Reed – – – – P. C.	141

B.

Berkley *v.* Thompson H. L. (E.)	45
Blethen, Exchange Bank of Yarmouth *v.* – – – P. C.	293
British SS. "Spearman," Russian SS. "Yourri" *v.* – P. C.	276
Brodie, Mann *v.* – H. L. (Sc.)	378
Burdick, Sewell *v.* – H. L. (E.)	74
Burnett *v.* Great North of Scotland Railway Company H. L. (Sc.)	147

C.

Carter, Holmes *v.* – – P. C.	664
——— *v.* Molson – – P. C.	664
Commissioners of Church Temporalities in Ireland *v.* Grant H. L. (I.)	14
Commissioners of French Hoek *v.* Hugo – – – P. C.	336
Cox, Munster *v.* – H. L. (E.)	680
Cropper, Smith *v.* – H. L. (E.)	249

D.

Davies, Harris *v.* – – P. C.	279
Duffett *v.* McEvoy – – P. C.	300
Dunlop, Hamilton (Duke of) *v.* H. L. (Sc.)	813

E.

Edge, Walton *v.* – H. L. (E.)	33
Escallier *v.* Escallier – P. C.	312
Ewing *v.* Orr Ewing H. L. (Sc.)	453
Exchange Bank of Yarmouth *v.* Blethen – – – P. C.	293

G.

G. *v.* M. – – H. L. (Sc.)	171

PAGE

Grant, Commissioners of Church Temporalities in Ireland *v.* H. L. (I.) 14
Great North of Scotland Railway Company, Burnett *v.* H. L. (Sc.) 147

H.

Hamilton (Duke of) *v.* Dunlop H. L. (Sc.) 813
Harris *v.* Davies – – P. C. 279
Holmes *v.* Carter – – P. C. 664
Hugo, Commissioners of French Hoek *v.* – – – P. C. 336

I.

Inglis *v.* Stock – H. L. (E.) 263

K.

Kaltenbach *v.* Lewis H. L. (E.) 617

L.

La Compagnie de Fives-Lille, Prévost *v.* – – – P. C. 643
Last *v.* London Assurance Corporation – – H. L. (E.) 438
Lauderdale Peerage, The H. L. (Sc.) 692
Lewis, Kaltenbach *v.* H. L. (E.) 617
London Assurance Corporation, Last *v.* – – H. L. (E.) 438
Lovat Peerage, The H. L. (Sc.) 763

M.

M, G. *v.* – – H. L. (Sc.) 171
McEvoy, Duffett *v.* – – P. C. 300
McGibbon *v.* Abbott – P. C. 653
Maclure, Marshall *v.* – P. C. 325
Maffet, Wakefield *v.* H. L. (I.) 422
Mann *v.* Brodie – H. L. (Sc.) 378
Marshall *v.* Maclure – P. C. 325
Mercier, Williams *v.* H. L. (E.) 1
Metropolitan Bank *v.* Pooley H. L. (E.) 210
Molson, Carter *v.* – – P. C. 664
Munster *v.* Cox – H. L. (E.) 680

N.

PAGE

North British Railway Company *v.* Perth (Lord Provost of) H. L. (Sc.) 579

O.

Ocean Steamship Company, Anderson, Tritton, & Co. *v.* H. L. (E.) 107
Orr Ewing, Ewing *v.* H. L. (Sc.) 453

P.

Perth (Lord Provost of), North British Railway Company *v.* H. L. (Sc.) 579
Plumstead District Board of Works, Spackman *v.* H. L. (E.) 229
Pooley, Metropolitan Bank *v.* H. L. (E.) 210
Portsmouth (Mayor of) *v.* Smith H. L. (E.) 364
Powell *v.* Apollo Candle Company – – – – P. C. 282
Prévost *v.* La Compagnie de Fives-Lille – – – P. C. 643

R.

Reed, Attorney-General for Quebec *v.* – – – P. C. 141
Reg. Riel *v.* – – – P. C. 675
Riel *v.* Reg. – – – P. C. 675
River Dee Company, Wenlock (Baroness) *v.* – H. L. (E.) 354
Russell *v.* Watts – H. L. (E.) 590
Russian SS. "Yourri" *v.* British SS. "Spearman" – P. C. 276

S.

St. Leonard, Shoreditch, Parochial Schools, *In re* – P. C. 304
Sandeman *v.* Scottish Property and Building Society H. L. (Sc.) 553
Scottish Property and Building Society, Sandeman *v.* H. L. (Sc.) 553

		PAGE
Seward *v.* "Vera Cruz" (Owners of). The "Vera Cruz"	H. L. (E.)	59
Sewell *v.* Burdick	H. L. (E.)	74
Small *v.* Smith	H. L. (Sc.)	119
Smith *v.* Cropper	H. L. (E.)	249
———, Portsmouth (Mayor of) *v.*	H. L. (E.)	364
———, Small *v.*	H. L. (Sc.)	119
Spackman *v.* Plumstead District Board of Works	H. L. (E.)	229
Stock, Inglis *v.*	H. L. (E.)	263
Svendsen *v.* Wallace	H. L. (E.)	404

T.

Thompson, Berkley *v.*	H. L. (E.)	45

V.

		PAGE
"Vera Cruz," The. Seward *v.* "Vera Cruz" (Owners of)	H. L. (E.)	59
———— (Owners of), Seward *v.* The "Vera Cruz"	H. L. (E.)	59

W.

Wakefield *v.* Maffet	H. L. (I.)	422
Wallace, Svendsen *v.*	H. L. (E.)	404
Walton *v.* Edge	H. L. (E.)	33
Watts, Russell *v.*	H. L. (E.)	590
Wenlock (Baroness) *v.* River Dee Company	H. L. (E.)	354
Williams *v.* Mercier	H. L. (E.)	1

TABLE OF CASES CITED.

A.

		PAGE
A. falsely called B. *v.* B.	1 Sp. Ecc. & Ad. 16; 2 Rob. 625	183
Abbott *v.* Middleton	7 H. L. C. 68	424
Aberdeen (Magistrates of) *v.* More	Hume's Dec. 502	692
Alexander *v.* Officers of State	Law Rep. 1 H. L., Sc. 276; 6 Court Sess. Cas. 3rd Series (H.L.) 54; Dickson on Evidence, sect. 102	773
Allen *v.* Taylor	16 Ch. D. 359	595
American Bank *v.* Doolittle	Massachusett's Rep. vol. xxxi. p. 123	294
Anderson *v.* Morice	Law Rep. 10 C. P. 609; 1 App. Cas. 713	264
Andrews *v.* Drewer	3 Cl. & F. 314	16
Angus *v.* Dalton	6 App. Cas. 740	386, 611
Archer *v.* Kelly	1 Dr. & Sm. 300	3
Armstrong *v.* Stokes	Law Rep. 7 Q. B. 598	627
Arthur *v.* Barton	6 M. & W. 138	110
Ashbury Railway Carriage and Iron Company *v.* Riche	Law Rep. 7 H. L. 653	356
Atcherley *v.* De Moulin	2 K. & J. 186	3
Atkinson *v.* Raleigh	3 Q. B. 79	227
Attorney-General *v.* Durham (Earl of)	46 L. T. (N.S) 20	21
——— *v.* Great Eastern Railway Company	5 App. Cas. 473	125, 357
——— *v.* Norstedt	3 Price, 97	645
Atwood *v.* Sellar	4 Q. B. D. 342; 5 Q. B. D. 286	404

B.

B——n *v.* B——n	1 Spk. Ecc. & Ad. 248; 2 Rob. Ecc. Rep. 580	179
Bain *v.* Hamilton (Duke of)	3 Court Sess. Cas. 3rd Series, 821	816
Bald *v.* Buchanan	Mor. 15084	562
Barholm (Lady) *v.* Dalrymple	Mor. Dic. 7187	569
Bauman *v.* St. Pancras (Vestry of)	Law Rep. 2 Q. B. 528	231
Bax *v.* Whitbread	16 Ves. 15	655
Beaton *v.* Scot	M. 3664	562
Beatton *v.* Ogilbie	July 13, 1670; 1 Stair Rep.	383
Beldon *v.* Campbell	6 Ex. 886	110
Benson *v.* Chapman	2 H. L. C. 696	407
——— *v.* Duncan	3 Ex. 644	407
Berkeley Peerage Case	4 Camp. 401	773

		PAGE
Beta, The	Law Rep. 2 P. C. 447	62
Beveridge *v.* Moffat	4 Court Sess. Cas. 2nd Series, 1381	560
Bevil *v.* Rich	1 Ch. Cas. 309	661
Bilbao, The	Lush. 149	61
Billingsley *v.* Wills	3 Atk. 219	425
Birkeley *v.* Presgrave	1 East, 220	110, 408
Blake, Ex parte	16 Beav. 463	3
Blythe *v.* Granville	13 Sim. 190	3
Bold Buccleugh, The	7 Moo. P. C. 267	61
Bootle *v.* Scarisbrick	1 H. L. C. 167	424
Bowry *v.* Pope	1 Leon. 168	594
Bradlaugh *v.* Newdegate	11 Q. B. D. 1	213
Brettel *v.* Williams	4 Ex. 623	137
Briggs *v.* Morgan	2 Hagg. Con. Rep. 330	178
Brimelow *v.* Murray	9 App. Cas. 519	358
Brockie	2 Court Sess. Cas. 4th Series, 923	531
Brown *v.* Overbury	11 Ex. 715	236
——— *v.* Palmer	9 Court Sess. Cas. 1st Series, 224	468
——— *v.* Stirling-Maxwell's Executors	10 Court Sess. Cas. 4th Series, 1235; 20 S. L. R. 818	467
Browne *v.* Hare	3 H. & N. 484; 4 H. & N. 822	268
Brownlie *v.* Russell	8 App. Cas. 235	35
Burrell, Ex parte	1 Ch. D. 537	326
——— *v.* Burrell	Amb. 660	661
Bury's Case	5 Coke Rep. 201	184
Bushby *v.* Munday	5 Madd. 297	496
Butcher *v.* Butcher	9 Ves. 382; 1 V. & B. 89	655

C.

Caledonian Railway *v.* Sprot	2 Macq. 449	593
Cambuskenneth (Abbot of) *v.* Ramsay	Mor. 7179	561
Campbell *v.* Argyle's Vassals	M. 4176	561
——— *v.* Hall	1 Cowp. 204	737
——— *v.* Rucker	Hume's Dec. 258	535
Carmichael *v.* Ray	5 Tred. 365	497
Carpenter *v.* Buller	8 M. & W. 209	666
Carron Company *v.* McLaren	24 L. J. (Ch.) 620	468
Carruthers *v.* Johnston	Mor. 7235	561
Cassels *v.* Lamb	12 Court Sess. Cas. 4th Series, 722	553, 562
Castleden *v.* Castleden	29 L. J. (P. & M.) 81; 4 Macq. 160; 9 H. L. C. 186	174, 180
Castro *v.* Murray	Law Rep. 10 Ex. 213	213
Catterall *v.* Sweetman	1 Rob. Ecc. Rep. 321	734
Chambers *v.* Manchester and Milford Railway Company	5 B. & S. 588	357
Chappel *v.* Comfort	10 C. B. (N.S.) 802	89
Charterhouse (Prior of) *v.* Borthwick	M. 7180	562
Chevaux *v.* Aislabie	13 Sim. 71	425
Child *v.* Douglas	Kay, 560	603
Churchill *v.* Shepherd	33 Beav. 107	3
City of Chester, The	9 P. D. 182	112
Clara Killam, The	Law Rep. 3 A. & E. 161	62

		PAGE
Clarke *v.* Colls	9 H. L. C. 601	425
Cleland, Creditors of	Mor. 12634	704
Clements *v.* Macaulay	4 Court Sess. Cas. 3rd Series, 592	468
Clifton, The	3 Hagg. Adm. 120	109
Clinton's Trusts, In re	Law Rep. 13 Eq. 295	3
Cobbett *v.* Warner	Law Rep. 2 Q. B. 108	213
Cocksedge *v.* Fanshawe	1 Doug. 118	99
Codrington *v.* Foley	6 Ves. 364	424
Coles *v.* Sims	Kay, 56	603
Colman *v.* Eastern Counties Railway Company	10 Beav. 1	358
Coltart *v.* Tait	Mor. 9313	561
Compton *v.* Richards	1 Price, 27	603
Constantine *v.* Windle	6 Hill's Reports, 177	729
Cooper *v.* Wandsworth Board of Works	14 C. B. (N.S.) 180	233
Copenhagen, The	1 C. Rob. 289	406
Cotching *v.* Bassett	32 Beav. 101	593
Courteaux *v.* Hewetson	Law Rep. 6 P. C. 407	666
Coxe *v.* Harden	4 East, 211	77
Crean *v.* Hodgens	Haye's Rep. 184	226
Creswick *v.* Gaskell	16 Beav. 577	425
Cripps *v.* Wolcott	4 Madd. 11	425
Crossley & Sons *v.* Lightowler	Law Rep. 2 Ch. 486	594
Cruikshank *v.* Cruikshank	5 Court Sess. Cas. 2nd Series, 733	496
Cunliffe, Brooks, & Co. *v.* Blackburn & District Benefit Building Society	22 Ch. D. 61; 9 App. Cas. 857	35, 125, 358
Cunninghame *v.* Anstruther	Law Rep. 2 H. L. (Sc.) 223	660
Cuno *v.* Cuno	Law Rep. 2 H. L. (Sc.) 300	181
Cureton *v.* Mills	36 Amer. Rep. 703	466
Curriers' Company *v.* Corbett	2 Dr. & Sm. 355	595
Cuthbertson *v.* Young	1 Macq. 455; 14 Court Sess. Cas. 2nd Series, 300	383, 397

D.

Da Costa *v.* Newnham	2 T. R. 407	406
Dalhousie's (Countess of) Case	7 Cl. & F. 817	758
Dand *v.* Kingscote	6 M. & W. 197	591
Dann *v.* Spurrier	7 Ves. 235	595
Davidson *v.* Hamilton (Duke of)	1 Court. Sess. Cas. 1st Series, (2nd Ed.) 385	816
Davis *v.* Garrett	6 Bing. 716	412
Dawes *v.* Head	3 Pickering's Amer. Rep. 144.	464
Dawkins *v.* Saxe-Weimar (Prince Edward of)	1 Q. B. D. 499	213
Dawson's Trustees *v.* Maclean	22 Court Sess. Cas. 2nd Series, 685	496
Day *v.* Radcliffe	3 Ch. D. 654	424
De Bay, The	8 App. Cas. 559	112
De Beauvoir *v.* Owen	5 Ex. 166	21
De Cuadra *v.* Swann	16 C. B. (N.S.) 772	407
Deighton's Settled Estates, In re	2 Ch. D. 783	425
De Lovio *v.* Boit	2 Gallison Rep. 398	60
Denton *v.* Great Northern Railway Company	5 E. & B. 867	157

		PAGE
De Thoren *v.* Attorney-General	1 App. Cas. 686	734
De Wet *v.* Cloete	1 Menzies, 407	338
Diana, The	Lush. 539	62
Doe *v.* Oliver	2 Sm. L. C. 8th Ed. 902	623
—— *v.* Vardill	5 B. & C. 438; 2 Cl. & F. 571	317
Don's Estate, Re	4 Drew. 194	314
Donald *v.* Suckling	Law Rep. 1 Q. B. 585	76
Duclos *v.* Ryland	5 Moo. (C.P.) 518, n.	621
Dysart Case, The	6 App. Cas. 489	704, 763

E.

E. *v.* T. falsely called E.	3 Sw. & Tr. 312	180
E. U., The	1 Ad. & E. 63	111
Eastern Counties Railway Company *v.* Hawkes	5 H. L. C. 331	357
Ebsworth *v.* Alliance Marine Insurance Company	Law Rep. 8 C. P. 596	264
Ecclesiastical Commissioners *v.* Rowe	4 Q. B. D. 63; 5 App. Cas. 736	21
—— *v.* Sligo (Marquis of)	5 Ir. Ch. 46	21
Edinburgh (Magistrates of) *v.* Horsburgh	12 Court Sess. Cas. 1st Series, 597	561
Elgin (Magistrates of) *v.* Robertson	24 Court Sess. Cas. 2nd Series, 301	383
Ellis *v.* Manchester Carriage Company	2 C. P. D. 13	595
Ely (Dean of) *v.* Bliss	2 D. M. & G. 459; 5 Beav. 574	16, 22
Emperor *v.* Rolfe	1 Ves. Sen. 208	422
Enohin *v.* Wylie	10 H. L. C. 1; 31 L. J. (Ch.) 405	471
Evans *v.* Rees	9 C. B. (N.S.) 391	280
Ewart *v.* Cochrane	4 Macq. 117	592
Ewing *v.* Ewing	8 App. Cas. 831	373
—— *v.* Orr Ewing	9 App. Cas. 34; 22 Ch. D. 456	509
Excelsior, The	Law Rep. 2 A. & E. 268	62
Explorer, The	Law Rep. 3 A. & E. 289	62
Eyemouth (Creditors of)	5 Br. Sup. 856	560
Eyre *v.* McDowell	9 H. L. C. 619	17

F.

F. falsely called D. *v.* D.	4 Sw. 94	182
Fairclough *v.* Marshall	4 Ex. D. 37	596
Falvez *v.* De Souza	Journal du Droit International Privé, vol. iv. p. 429	463
Fenton *v.* Reid	4 Johnston's Rep. 52	728
Ferguson *v.* Douglas Heron & Company	3 Paton's Appeals, 503; 11 Fac. Coll. 157	496, 506
Fife (Earl of) *v.* Earl of Fife's Trustees	1 Murray's Jury Ct. Rep. 95	772
Figlia Maggiore, The	Law Rep. 2 A. & E. 106	77
Finnegan *v.* James	Law Rep. 19 Eq. 72	251
Flory *v.* Denny	7 Ex. 581	96
Forbes *v.* Morrison	13 Court Sess. Cas. 2nd Series, 1444	383
Foster's Case	11 Rep. 62 b.	357

		PAGE
Fowler *v.* Fowler	4 De G. & J. 250	326
——— *v.* Perrin	2 U. C. (Q.B.) 230	294
Fox *v.* Nott	6 H. & N. 630; 30 L. J. (Ex.) 259	77
Franconia, The	2 P. D. 163	59
Franklin *v.* Neate	13 M. & W. 481	75
Fraser *v.* Glasgow Bank	6 Court Sess. Cas. 4th Series, 1259	125
Freedom, The	Law Rep. 3 P. C. 594	77
Freeman *v.* Cooke	2 Ex. 663	613

G.

Garnett *v.* Bradley	3 App. Cas. 944	280
George *v.* Clagett	7 T. R. 359; 2 Sm. L. C. 8th Ed. 118	620
Gibson *v.* Hunter	2 H. Bl. 205	99
Giels *v.* Giels	17 Court Sess. Cas. 2nd Series, 397	692
Gill *v.* Kymer	5 Moo. (C.P.) 518	621
Gilmour *v.* Balfour	1 Court Sess. Cass. 2nd Series, 403	573
Gledstanes *v.* Allen	12 C. B. 202	105
Glenduror, The	Law Rep. 3 P. C. 592	110
Glyn *v.* East and West India Dock Company	5 Q. B. D. 129; 6 Q. B. D. 475; 7 App. Cas. 591	76, 95
Goetze *v.* Aders, Preyer & Co.	2 Court Sess. Cas. 4th Series, 150	480
Goodman's Trusts, In re	17 Ch. D. 266	314
Gordon, Ex parte	14 Otto, 515	62
——— *v.* Grant	13 Court Sess. Cas. 2nd Series, 1	692
Gore *v.* O'Grady	Ir. L. R. 1 Eq. 1	17
Goucher *v.* Clayton	34 L. J. (Ch.) 239	251
Graff *v.* De Nord	44 Penn. 527	655
Grafftey *v.* Humpage	1 Beav. 46	3
Grant *v.* Ellis	9 M. & W. 113	20
Grey *v.* Pearson	6 H. L. C. 61	424
Guest *v.* Guest	2 Hag. Con. Rep. 321	174
Guldfaxe, The	Law Rep. 2 A. & E. 325	62

H.

Hales *v.* Petit	Pl. Com. 258, 264 a.	10
Hall *v.* Janson	4 E. & B. 500	408
Hallett *v.* Wigram	9 C. B. 580	406
Hallett's Estate, In re	13 Ch. D. 696	666
Halliday *v.* Holgate	Law Rep. 3 Ex. 299	76
Hallifax *v.* Wilson	16 Ves. 168	424
Hamilton (Duke of) *v.* Graham	Law Rep. 2 H. L., Sc. 166; 7 Court Sess. Cas. 3rd Series, 981; 6 Ibid. 965	816
Harris *v.* Birch	9 M. & W. 591	76
Harvey *v.* Richards	1 Mason, Cir. Ct. (U.S.) Rep. 380	495, 514
Hastings *v.* Hastings	14 Court Sess. Cas. 2nd Series, 489	462

		PAGE
Hawkins *v.* Gathercole	6 D. M. & G. 1	68
Hector, The	3 Hagg. Adm. 95	109
Helen and George, The	Swab. 369	111
Hercules, The	2 Dod. 353	60
Heugh *v.* Chamberlain	25 W. R. 742	251
Hibbert *v.* Carter	1 T. R. 745	75
Hill *v.* Ramsey	House of Lords printed papers, 30 March, 1810	383
Hoare *v.* Hornby	2 Y. & C. Ch. 121	3
Hodge *v.* Reg.	9 App. Cas. 117	286
Hope *v.* Carnegie	Law Rep. 1 Ch. 320	469
—— *v.* Clifden	6 Ves. 499	424
Howes *v.* Ball	7 B. & C. 481	95
Howgrave *v.* Cartier	3 Ves. & B. 79	435
Humbert *v.* Trinity Church	24 Wendell's Rep. 625	729
Huntly *v.* Cairnborrow (Laird of)	M. 4170	561
Hyslop *v.* Shaw	1 Court Sess. Cas. 3rd Series, 535	561

I.

Industrie, The	Law Rep. 3 A. & E. 303	62
Ingilby *v.* Amcotts	21 Beav. 585	314
Innerkeithing (Magistrates of) *v.* Mowbray	5 Bro. Sup. Mor. 559; 10 App. Cas. 816, n.	816

J.

Jackson *v.* Gilchrist	15 Johnston's Reports 89	729
——— *v.* Litchfield	8 Q. B. D. 474	682
James *v.* Durant	2 Beav. 177	3
—— *v.* Salter	3 Bing. (N. C.) 544	21
Jenkins *v.* Murray	4 Court Sess. Cas. 3rd Series, 1054	382
Jenkyns *v.* Brown	14 Q. B. 496	76
Jesson *v.* Solly	4 Taunt. 52	89
Jewan *v.* Whitworth	Law Rep. 2 Eq. 692	622
Jeyes *v.* Savage	Law Rep. 10 Ch. 555	425
Job *v.* Langton	6 E. & B. 779	406
Johnson *v.* Emerson	Law Rep. 6 Ex. 329	213
——— *v.* Lawson	2 Bing. 86	773
——— *v.* Osenton	Law Rep. 4 Ex. 111	293
Johnston *v.* Jackson	21 American Rep. 285	468
——— *v.* Johnston	Mor. Dict. 4788; 1 Fol. Dict. 326; Colvil M.S. 280	506
Johnstone *v.* Beattie	10 Cl. & F. 42	474
Jones *v.* Jones	13 Sim. 561	425
—— *v.* Waller	3 Gwillim 847	772
Jones's Will, In re	2 Ch. D. 362	4

K.

Kemp *v.* Falk	7 App. Cas. 573	77
—— *v.* Halliday	6 B. & S. 723; Law Rep. 1 Q. B. 520	110

		PAGE
Kemp *v.* Kemp	5 Ves. 849	655
Kendall *v.* Hamilton	4 App. Cas. 504	688
Kennedy *v.* Cassillis (Earl of)	2 Sw. 313	496
King *v.* Birmingham (Inhabitants of)	8 B. & C. 29	734
—— *v.* Hoare	13 M. & W. 494	688

L.

L. *v.* L.	7 P. D. 16	184
Lagan or Mimax, The	3 Hagg. Adm. 418	60
Langston *v.* Langston	2 Cl. & F. 194	424
Lauderdale Case	10 App. Cas. 692	781
Leader *v.* Hodge	Hume, 261	467
Learoyd *v.* Robinson	12 M. & W. 745	621
Letterstedt *v.* Broers	9 App. Cas. 371	530
Leuckart *v.* Cooper	3 Scott, 521	621
Lewis *v.* Haywood	35 L. J. (P. & M.) 105	184
Lickbarrow *v.* Mason	1 Sm. L. C. (8th Ed.) 753; 2 T. R. 63; 1 H. Bl. 357. 2 H. Bl. 211; 6 East, 20, n.; 5 T. R. 683	75
Livingston of Parkhall *v.* York Buildings Company	5 Bro. Sup. Mor. 559; 10 App. Cas. 816, n.	820
Lloyd *v.* Guibert	Law Rep. 1 Q. B. 115	77
Lowther *v.* Condon	2 Atk. 127	425

M.

M. *v.* B.	33 L. J. 205	174
M. *v.* N.	2 Rob. 629	183
M. falsely called C. *v.* C.	Law Rep. 2 P. & D. 419	180
M. falsely called H.	3 Sw. & Tr. 517	182
Macdonald *v.* Union Bank	2 Court. Sess. Cas. 3rd Series, 963	692
Mackey *v.* Coxe	18 How (U. S.) 100	496
Mackintosh *v.* Moir	9 Court Sess. Cas. 3rd Series, 574	382
Maclachlan *v.* Meiklam	19 Court Sess. Cas. 2nd Series, 960	469
Macmaster *v.* Macmaster	11 Court Sess. Cas. 1st Series, 685; 12 Ibid. 731	468
———— *v.* Stewart	12 Court Sess. Cas. 1st Series, 731	508
Macnee *v.* Gorst	Law Rep. 4 Eq. 315	621
Macpherson *v.* Reid's Trustees	4 Court Sess. Cas. 4th Series, 135; 10 App. Cas. 768, n.	768
Madden *v.* Wilson	6 Ir. Jur. 129	17
Madeline Smith	2 Irving's Justiciary Rep. 653	692
Malvina, The	Lush. 493; Brown. & Lush. 57	62
Margo *v.* MacHenry	Journal du Droit International Privé, vol. 8, p. 432	463
Marshall *v.* Martin	Law Rep. 5 Q. B. 239	280
Martin *v.* Lee	14 Moore, P. C. 142	653
Mason *v.* Mason	M. 7180	562
Medina, The	1 P. D. 272; 2 P. D. 5	110
Melpomene, The	Law Rep. 4 A. & E. 129	111

		PAGE
Mendham *v.* Williams	Law Rep. 2 Eq. 396	425
Mersey Docks *v.* Lucas	8 App. Cas. 891	440
Meyerstein *v.* Barber	Law Rep. 2 C. P. 44, 675; 4 H. L. 317	76
Mildred *v.* Maspons	8 App. Cas. 874	621
Miller *v.* Moffat	2 Murray's Jury Ct. Rep. 318.	773
Milne *v.* Samson	16 Court Sess. Cas. 2nd Series, 355	772
Miner *v.* Gilmour	12 Moore's Ind. Ap. Cas. 131	336
Minnehaha, The	Lush. 335; 15 Moo. P. C. 133	111
Mocatta *v.* Linde	9 Sim. 56	425
Moncrief *v.* Balnagowne	Mor. 9315	561
Monk *v.* Ouimet	19 L. C. J. 74	644
Monkton *v.* Attorney-General	2 Russ. & My. 147	773
Monro *v.* Monro	7 Cl. & F. 842	758
Moore *v.* Clementson	2 Camp. 22	621
Moran *v.* Jones.	7 E. & B. 523	110, 406
Morison	M. 4601	467
——— *v.* Ker.	Mor. Dict. 4601; 10 Fac. Col. 233	507
Morrall *v.* Sutton	1 Ph. 533	425
Morris *v.* Davies	5 Cl. & F. 163	734
——— *v.* Edginton	3 Taunt. 24	596
Moss *v.* Smith	9 C. B. 94	407
Mostyn *v.* Fabrigas	1 Sm. L. C. 689	522
——— *v.* Mostyn	1 Col. Ch. C. 161	425
Mouton *v.* Van der Merwe	Buchanan's Reports, 1876, part 1, p. 18	338
Munce *v.* Black	7 Ir. C. L. R. 475	227
Munro	2 Court Sess. Cas. 2nd Series, 1151	467
——— *v.* Graham	1 Court Sess. Cas. 2nd Series, 1154	496
——— *v.* Munro	1 Rob. App. 492	727
Murray *v.* Scott	9 App. Cas. 519	131
Mutual Society, In re	24 Ch. D. 425, n.	35
Myer *v.* Van der Deyl	Abb. on Shipping, 5th Ed., p. 362	410

N.

Navulshaw *v.* Brownrigg	2 D. M. & G. 441	630
Needham *v.* Oxley	1 H. & N. 248	251
Nepoter, The	Law Rep. 2 A. & E. 375	77
Netterville *v.* Power	6 Ir. Jur. (N.S.) 123	18
New Zealand and Australian Land Company *v.* Watson	5 Q. B. D. 474; 7 Q. B. D. 374	617, 621
Newman *v.* Walters	3 B. & P. 612	110
Newsom *v.* Thornton	6 East, 17	76
Nicholas *v.* Chamberlain	Cro. Jac. 121	592
Nicholson *v.* Chapman	2 H. Bl. 257	110
Nicolson *v.* Bightie	14th Nov. 1662	383
Norwich Building Society, In re	45 L. J. (Ch.) 785	35

O.

Otter *v.* Melvill	2 De G. & S. 257	3

P.

		PAGE
Packham *v.* Gregory	4 Hare, 396	425
Paddington (Vestry of) *v.* Snow	45 L. T. (N.S.) 475	232
Palmer *v.* Fletcher	1 Lev. 122	592
Payne *v.* Brecon (Mayor of)	3 H. & N. 572	357
Pearson *v.* Spencer	1 B. & S. 571; 3 B. & S. 767.	592
Pease *v.* Gloahec	Law Rep. 1 P. C. 219	77
Pedder's Settlement Trusts, In re	Law Rep. 10 Eq. 585.	3
Perfect *v.* Curzon	5 Madd. 442	435
Perrin *v.* Garfield	37 Vermont, 304	338
Peters *v.* Martin	4 Court Sess. Cas. 1st Series, 108	496
Phantom, The	Law Rep. 1 A. & E. 58	111
Pheysey *v.* Vicary	16 M. & W. 484	591
Phillips *v.* Huth	6 M. & W. 572	621
Phosphate Sewage Company *v.* Lawson's Trustee	5 Court Sess. Cas. 4th Series, 1125	480
Piers *v.* Piers	2 H. L. C. 331; 2 Dru. & W. 298	734, 761
Pinnington *v.* Galland	9 Ex. 1	593
Plummer *v.* Wildman	3 M. & S. 482	406
Pomfret *v.* Ricroft	1 Wms. Saund. (Ed. 1871) p. 569, note 6	591
Poole *v.* Huskisson	11 M. & W. 830	386
Power *v.* Whitmore	4 M. & S. 141	406
Powis *v.* Burdett	9 Ves. 428	424
Preston *v.* Melville	2 Rob. App. 88	463
Prowse *v.* Abingdon	1 Atk. 482	425
Prudential Assurance Company *v.* Cheyne	11 Court Sess. Cas. 4th Series, 871	562
Pyer *v.* Carter	1 H. & N. 916	592
Pym *v.* Great Northern Railway Company	4 B. & S. 396; 32 L. J. (Q.B.) 377	61

Q.

Queen's Building Society, In re	Law Rep. 6 Ch. 819	35

R.

Raeburn *v.* Geddes	9 Court Sess. Cas. 3rd Series, 20	560
Read *v.* Great Eastern Railway Company	Law Rep. 3 Q. B. 555	61
Reg. *v.* Bertrand	Law Rep. 1 P. C. 520	677
—— *v.* Burah	3 App. Cas. 889	286
—— *v.* Coote	Law Rep. 4 P. C. 599	677
—— *v.* Lightfoot	6 E. & B. 822; 25 L. J. (M.C.) 115	46
—— *v.* Murphy	Law Rep. 2 P. C. 535	677
Retief *v.* Louw	Buchanan's Reports, 1874, Part IV., p. 165.	338
Rex *v.* Tullibarden	M. 7179	562
Richards *v.* Rose	9 Ex. 218	592
Robinson *v.* Barton Eccles (Local Board of)	8 App. Cas. 798	365
Robson *v.* Walsham	6 Court Sess. Cas. 3rd Series, 4	468
Roddy *v.* Fitzgerald	6 H. L. C. 823	424

		PAGE
Rodgers *v.* Harvie	3 W. & S. 251	383
Roebuck *v.* Dean	2 Ves. 265	424
Rona, The	5 Asp. Mar. Law Cas. 259; 51 L. T. (N.S.) 28	408
Rose *v.* Cornish	16 L. T. (N.S.) 786	3
Rosetto *v.* Gurney	11 C. B. 167	417
Ross *v.* Heriot's Hospital	18 F. C. 393	561
Rossmore's Trustees *v.* Brownlie	5 Court Sess. Cas. 4th Series, 201	561
Royal Bank of India's Case	Law Rep. 4 Ch. 260	125
Ruckers, The	4 C. Rob. 73	60
Russell *v.* Reg.	7 App. Cas. 829	286

S.

S. *v.* A.	3 P. D. 75	182
S. falsely called E. *v.* E.	3 Swa. & T. 240	182
St. Cloud, The	Brown. & Lush. 4	77
St. George's, Hanover Square *v.* Sparrow	16 C. B. (N.S.) 209; 33 L. J. (M.C.) 118.	231
Salkeld *v.* Johnston	1 Mac. & G. 242	16
Sanderson *v.* Stiven	10 Court Sess. Cas. 4th Series, 622	572
Sarah, The	Lush. 549	62
Saunderson *v.* Stoney	2 Ir. Eq. 153.	17
Schenk *v.* Legh	9 Ves. 300	425
Schreiber *v.* Creed	10 Sim. 9	593
Scott *v.* Avery	5 H. L. C. 811	235
—— *v.* Elliott	Mor. 4845	495
—— *v.* Jones	2 Notes of Cases (Ecc.) 36	184
Seagrave *v.* Union Marine Insurance Company	Law Rep. 1 C. P. 305	264
Seamer *v.* Bingham	3 Atk. 56	424
Selby *v.* Whittaker	6 Ch. D. 239	425
Selkrig *v.* Davies	2 Dow. 230	480
Sheil *v.* Incorporated Society	10 Ir. Eq. 411	18
Shipton *v.* Thornton	9 A. & E. 314	407
Short *v.* Simpson	Law Rep. 1 C. P. 248	76
Shrewsbury and Birmingham Railway Company *v.* London and North Western Railway Company	6 H. L. C. 113	357
Simonds *v.* White	2 B. & C. 811	415
Simpson *v.* Smith	Law Rep. 6 C. P. 87	229
Smith *v.* Bank of Scotland	5 Court Sess. Cas. 1st Series, 98	774
—— *v.* Brown	Law Rep. 6 Q. B. 729	62
Smith's Trustees *v.* Grant	24 Court Sess. Cas. 2nd Series, 1142	462
Smurthwaite *v.* Wilkins	11 C. B. (N.S.) 842	76
Solomon *v.* Vintners' Company	4 H. & N. 585	595
South Eastern Railway Company *v.* Brogden	3 Mac. & G. 8	496
South Yorkshire Railway Company *v.* Great Northern Railway Company	9 Ex. 55	357
Southgate *v.* Montgomerie	15 Court Sess. Cas. 1st Series, 507	490
Spalding *v.* Ruding	6 Beav. 376	77
Sparkes *v.* Marshall	2 Bing. N. C. 761	274

		PAGE
Sparrow *v.* Harrison	3 Curteis, 16	184
Spencer *v.* Spencer	5 Ves. 362	655
Stewart *v.* West India and Pacific Steam-ship Company	Law Rep. 8 Q. B. 88, 362	406
Stindt *v.* Roberts	17 L. J. (Q.B.) 166	89
Stirling Peerage Case	Swinton's Stirling Crim. Trial, 177	704
Stolworthy *v.* Sancroft	10 Jur. (N.S.) 762	654
Stow *v.* Blackburn	1 Mood. & Rob. 547	314
Strathmore Case, The	Riddell's Peerages, vol. ii. p. 418	735
Stuart *v.* Bute (Marquis of)	9 H. L. C. 440	474
Suffield *v.* Brown	4 D. J. & S. 185	592
Sutton and Elliott, In re	11 Q. B. D. 377	300
Swallow *v.* Binns	1 K. & J. 417	425
Swansborough *v.* Coventry	9 Bing. 305	593
Sylph, The	Law Rep. 2 A. & E. 24	62

T.

Taverner *v.* Ditchford	31 L. J. (Mat.) 105	174
Taylor *v.* Chichester and Midhurst Railway Company	Law Rep. 2 Ex. 356; Ibid. 4 H. L. 628	357
Teede *v.* Johnson	11 Ex. 845	295
Tenant *v.* Goldwin	6 Mod. 314; 2 Ld. Raym. 1093; 1 Salk. 360	592
Thompson *v.* Dominy	14 M. & W. 403	91
Toulmin *v.* Steere	3 Mer. 210	593
Tracy *v.* Atherton	36 Vermont, 503	338
Tulk *v.* Moxhay	2 Phil. 774	593
Turner *v.* Ballandene	10 Court Sess. Cas. 1st Series, 418; 7 Will. & Sh. 163	816
——— *v.* Liverpool Docks (Trustees of)	6 Ex. 543	76
Tweeddale's (Marquis of) Trustees *v.* Haddington (Earl of)	7 Court Sess. Cas. 4th Series, 620	561
Two Ellens, The	Law Rep. 4 P. C. 161	61
Tyson *v.* Dorr	6 Wharton, 256	299

U.

U——n falsely called F——s *v.* F——s	2 Rob. Ecc. Rep. 614	184
Uhla, The	Law Rep. 2 A. & E. 29, n.	62
Undaunted, The	Lush. 90	111

V.

Van *v.* Clark	1 Atk. 510	425
Van Breda *v.* Silberbauer	Law Rep. 3 P. C. 84	336
Veale's Trusts, In re	4 Ch. D. 65	654
Vermaak *v.* Palmer	Buchanan's Reports, 1876, p. 32	338
Viant's Settlement Trusts, In re	Law Rep. 18 Eq. 436	4
Virtue *v.* Commissioners of Police of Alloa	1 Court Sess. Cas. 4th Series, 285	480
Volent, The	1 Wm. Rob. 383	60
Vowles *v.* Young	13 Ves. 147	773

W.

		PAGE
W. *v.* R.	1 P. D. 408	181
Wallace *v.* Dundee (Police Commissioners of)	2 Court Sess. Cas. 4th Series, 565	384
Walthew *v.* Mavrojani	Law Rep. 5 Ex. 116	408
Wandsworth Board of Works *v.* Hall	Law Rep. 4 C. P. 85	231
Watson's Trusts, In re	Law Rep. 10 Eq. 36	425
Watts *v.* Kelson	Law Rep. 6 Ch. 171	594
Waverley, The	Law Rep. 3 A. & E. 369	110
Wegener *v.* Smith	15 C. B. 285	89
Welde *v.* Welde	2 Lee, 585	182
Wemyss *v.* Thomson	14 Court Sess. Cas. 1st Series, 233	560
Westzinthus, In re	5 B. & Ad. 817	77
Whatman *v.* Gibson	9 Sim. 196	603
Wheeldon *v.* Burrows	12 Ch. D. 31	592
Whitecross Wire Company *v.* Savill	8 Q. B. D. 653	406
Whitehead *v.* Thompson	23 Court Sess. Cas. 2nd Series, 772	490
Whitworth *v.* Hall	2 B. & Ad. 695	210
Wilkinson *v.* Anglo-Californian Gold Mining Company	18 Q. B. (N.S.) 728	293
Willis *v.* Willis	3 Ves. 51	424
Willoughby of Parham Case	Cruise on Dignities, 169	767
Wilmott's Trusts, In re	Law Rep. 7 Eq. 532	424
Wilson *v.* Bank of Victoria	Law Rep. 2 Q. B. 203	407
Wilton *v.* Colvin	3 Drew. 617	3
Wood *v.* Leadbitter	13 M. & W. 843	339
Woodcock *v.* Dorset (Duke of)	3 Bro. C. C. 569	424
Wordsworth *v.* Wood	1 H. L. C. 129	424
Worms *v.* Storey	11 Ex. 427	407
Wright *v.* Campbell	4 Burr. 2047	101

Y.

Young, Ex parte	19 Ch. D. 124	682
—— *v.* Barclay	8 Court Sess. Cas. 2nd Series, 774	469
—— *v.* Ramage	16 Court Sess. Cas. 1st Series, 572	468

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTCH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE PRIVY COUNCIL

[HOUSE OF LORDS.]

H. L. (E.)
1884
Nov. 4.

THOMAS ANTHONY HWFA WILLIAMS . APPELLANT;

AND

MARIE MERCIER . . . . . RESPONDENT.

Husband and Wife—Married Woman—Marriage Settlement—Covenant to settle Property to which Wife or Husband in her right "shall become entitled."

In a settlement made before marriage there was an agreement to settle upon certain trusts all real and personal property to which the wife or the husband "in her right at any time during her now intended coverture shall become entitled (except jewels and" certain other articles "which it is hereby declared shall belong to" the wife "for her separate use)." The trusts included a power of sale, the moneys arising from the sale to be held upon the trusts agreed and declared concerning such part of the personal estate of or to which the wife "now is or she or" the husband "in her right shall become possessed or entitled as aforesaid":—

Held, affirming the decision of the Court of Appeal, that on the true construction of the agreement, read in conjunction with the context, it included property to which the wife was entitled before marriage; and therefore that jewels given to the wife before marriage were within the exception and belonged to the wife for her separate use.

APPEAL from an order of the Court of Appeal (1).

The respondent having obtained judgment against the appel-

(1) 9 Q. B. D. 337.

961

H. L. (E.) 1884 WILLIAMS v. MERCIER.

lant's wife, sued alone, a fi. fa. was issued under which the sheriff seized certain jewelry in the appellant's house. The appellant having claimed it, an interpleader issue was ordered in which the appellant as plaintiff affirmed and the respondent as defendant denied that the jewelry was at the time of the seizure (the 30th of September 1881) the property of the appellant as against the respondent. The issue was tried before Lord Coleridge C.J. and a jury, when it was proved that the jewelry consisted of articles given to the appellant's wife before marriage, mostly wedding presents.

A settlement made before the marriage of the appellant and his wife (then Florence Farquharson), and dated the 21st of March, 1881, contained the following clause: "It is hereby agreed and declared that all real and personal property to which the said F. Farquharson or the said T. A. H. Williams in her right at any time during her now intended coverture shall become entitled whether in possession, reversion, or otherwise (except jewels, trinkets, ornaments of the person, plate, linen, china, furniture, pictures, prints, books and articles of the like nature, which it is hereby declared shall belong to the said F. Farquharson for her separate use, and except also any legacy or other property acquired at one and the same time, not exceeding in amount or value the sum of £300) shall" be transferred to and vested in the trustees upon certain trusts. The trusts included a power of sale, "so nevertheless that the money to arise from such sale be held and applied upon the trusts and with and subject to the powers, provisoes, agreements and declarations hereinbefore declared and contained concerning such part of the personal estate of or to which the said F. Farquharson *now is* or she or the said T. A. H. Williams in her right shall become possessed or entitled as aforesaid and shall consist originally of money."

Lord Coleridge C.J. directed a verdict for the appellant. The Queen's Bench Division (Mathew and Cave JJ.) being equally divided discharged a conditional order for a new trial, which had been granted on the ground of misdirection. The Court of Appeal (Jessel M.R. and Lindley L.J.) made an order to set aside the verdict for the appellant, and to enter it for the respondent (1). Before Lord Coleridge and the Queen's Bench Division

(1) 9 Q. B. D. 337.

the case was argued upon the assumption that the jewelry was not included in the marriage settlement. On the present appeal the only question raised was upon the construction of the settlement; and it was not disputed that if the jewelry fell within the exception above set out the respondent was entitled to it under the execution.

Sir *H. Giffard* Q.C. and *Chester* for the appellant:—

The settlement of after-acquired property and the exception thereto only apply to property acquired after the marriage, not to property which passes from the wife to the husband upon the marriage. Such property cannot be properly described as acquired during the coverture. Nor is it accurate to speak of it as acquired by the husband "in right of" the wife. Those words would be used by conveyancers to designate the right of property a husband acquires in freeholds or chattels real of the wife or her choses in action reduced into possession by him during the coverture. If property in existence at the time of the settlement had been intended to pass it would have been scheduled and expressly settled. The fact that it was not shews that the parties meant to deal only with future and contingent interests which could not be particularly described. The words in the settlement are in the ordinary form and have been the subject of judicial interpretation. The earlier cases—*Grafftey* v. *Humpage* (1); *James* v. *Durant* (2); *Blythe* v. *Granville* (3)—certainly favour the construction adopted by the Court of Appeal, but except in one instance they have not been followed in later times. The current of more modern authorities supports the appellant's contention: *Hoare* v. *Hornby* (4); *Otter* v. *Melvill* (5); *Ex parte Blake* (6); *Churchill* v. *Shepherd* (7); *Atcherley* v. *Du Moulin* (8); *Wilton* v. *Colvin* (9); *Archer* v. *Kelly* (10); *Rose* v. *Cornish* (11); *In re Pedder's Settlement Trusts* (12); *In re Clinton's Trust* (13).

(1) 1 Beav. 46.
(2) 2 Beav. 177.
(3) 13 Sim. 190.
(4) 2 Y. & C. Ch. Cas. 121.
(5) 2 De G. & S. 257.
(6) 16 Beav. 463.
(7) 33 Beav. 107.
(8) 2 K. & J. 186.
(9) 3 Drew. 617.
(10) 1 Drew. & Sm. 300.
(11) 16 L. T. (N.S.) 786.
(12) Law Rep. 10 Eq. 585.
(13) Law Rep. 13 Eq. 295.

H. L. (E.) 1884 WILLIAMS v. MERCIER.

The one exception in recent times is *In re Viant's Settlement Trusts* (1), but the judgment of Bacon V.C. was strongly dissented from by Jessel M.R. in *In re Jones's Will* (2). The subsequent reference in the settlement to trusts, &c. of property to which the intended wife "now is" entitled must be rejected as inserted per incuriam.

Warmington Q.C. and *F. O. Crump* for the respondent were not heard.

EARL OF SELBORNE L.C.:—

My Lords, this case has been ably argued, and all has been said which I think could possibly be said upon the argument of the particular question on which the Court of Appeal proceeded. We have not to determine what would have been the position of this jewelry for the purpose of the interpleader issue, if the matter had stood as it was supposed to stand in the Queen's Bench Division. Nothing therefore which we may now say will bear one way or the other upon that question which was determined by Lord Coleridge and by Mathew J. It was supposed before the Queen's Bench Division, and at the trial, that this settlement did not affect this property.

In the Court of Appeal the settlement was examined, and the Court unanimously thought, and apparently without any doubt or hesitation, that the settlement decided this question, and vested the jewelry in the wife for her separate use, and consequently that the creditor was entitled to have execution against these jewels.

Now, so far as the facts are concerned, the evidence points to a title acquired by the wife before the marriage, the greater part of the property being in the shape of presents given by friends, and some by the husband, in anticipation of the marriage, a smaller part by some earlier title. So that for the purpose of the present question it may be taken, I think, as property which belonged to her as a feme sole before her marriage; and I think that no distinction in that respect which is satisfactory can be drawn, at all events for the purpose of the construction of this

(1) Law Rep. 18 Eq. 436. (2) 2 Ch. D. 362.

instrument, between those articles which had been given by friends as presents in expectation of the marriage and those articles which she had otherwise. Nor do I think that there is any difference between articles given by the husband and articles given by other friends; because if given before the marriage, there being no evidence of any condition attached to the gift of them, I take it that in point of law they were hers, subject of course to the effect of the marriage when it took place, and subject of course to the effect of this deed of settlement which was executed before the marriage.

The Court of Appeal held that in that situation these jewels belonged to the wife, under the express terms of the settlement, for her separate use, and beyond all doubt that decision is correct if they are within the exception, because the exception is of all "jewels, trinkets," and so forth, "which it is hereby declared shall belong to her for her separate use." But then the exception is from a covenant which as to things not excepted would be operative to settle that to which the covenant applies; and it is argued, and I will for the present purpose assume it to be rightly argued, that nothing is excepted which but for the exception would not have come within the antecedent words of description, that is to say, which would not but for the exception have been, under those antecedent words, a subject of settlement. Well what are those antecedent words? "It is hereby agreed and declared that all real and personal property to which the said Florence Farquharson or the said T. A. H. Williams in her right at any time during her now intended coverture shall become entitled, whether in possession, reversion, or otherwise," shall be settled.

Let us for a moment look at those words as they stand by themselves, and without reference to any of the authorities. It is to be observed that there is there a perfect generality as to the subject; "all real and personal property," without the addition of any words which can assist the construction as shewing by what sort of title that property was to become the wife's. In some of the cases the words "devise," "descent," and so on, or other words, occur, which whether of greater or less weight, may at all events have been of some use in assisting the construction and tending to shew that an after-acquired title alone was in

H. L. (E.) 1884 WILLIAMS v. MERCIER. Earl of Selborne, L.C.

view. If those words are of importance for that purpose, they do not occur here.

Again, there is an exception of jewels and so forth; and as far as the nature of that exception and the intention indicated by it go, it certainly does not seem obvious, that the principle on which such an intention would proceed as to after-acquired "jewels, trinkets, ornaments of the person, books and articles of the like nature," and some other things, might not extend as much to presents of that kind given by the husband or friends in contemplation of the marriage, or already in possession of the wife, as to those things which might be given afterwards. I am not aware that in any of the authorities which have been referred to there is any exception of that kind calculated to give any assistance in the investigation of the intention.

There is nothing here indicating an intention not to include in the covenant property then vested in the wife; and there is something which is not found in other cases, which, at least in its principle, would be consistent with an intention to include it; and, if so, to include in the exception the things of the same sort of which she was already possessed as well as those which might come to her afterwards. Still, if the words are not, in their proper literal and grammatical construction, capable of being applied to that to which she was already entitled, that which I have said might be an insufficient reason for holding that they do so apply. But can it possibly be said, upon any sound principles of construction, that the words are incapable of being so applied? What are they? "All real and personal property to which the said Florence Farquharson or the said T. A. H. Williams in her right at any time during her now intended coverture shall become entitled." If the wife only had been mentioned, if it had been "to which she at any time during her now intended coverture shall become entitled," they would have been words of futurity, exclusive of the title already vested in the wife. That was the case in some of the authorities; and the argument would have been strong, if it had been so here, that there were no words to cover what she was already entitled to. But the words do not relate to the wife only—they relate to her or her intended husband in her right. He at all events had no title, at the time

at which this instrument was made, to anything which belonged to her, and if he acquired a title it must necessarily be a future title; and the only question would be, whether it was in her right, and whether it was acquired by him during the then intended coverture. Well, it was in her right, I conceive; for when the wife's property is transferred to the husband he is subrogated to the right which she had before. He does not claim it by any original right of his own, he claims it in that which was an original right of his wife, of which he is now, by virtue of his marital title, to obtain the benefit. The words "in her right" therefore are, in my judgment, capable of being properly, sensibly, and grammatically applied to property of this description to which the husband might become entitled by reason of the marriage.

Then the question would be whether the words "at any time during her now intended coverture" would apply. Surely you cannot exclude from the duration of the coverture the first moment of its inception any more than you can the last moment of its continuance. The moment that the marriage is complete by the performance of that which makes the parties husband and wife, that moment the coverture begins, and if at that moment he becomes entitled as her husband in her right, I am unable to say that it is not during the intended coverture, in a sense which the words may rightly, grammatically, and reasonably bear.

Now far be it from me to say, that a context, or an intention discovered from those extrinsic facts and circumstances which are legitimately to be taken into account, might not lead to the conclusion, that what was meant was only that property, which the wife should afterwards acquire, and in which the husband should succeed to the rights or become subrogated to the rights so afterwards acquired by her. Many circumstances might justify such a conclusion. Authorities have been referred to in which such a conclusion was arrived at. I will mention one of them by way of illustration only—such a case as *Hoare* v. *Hornby* (1), where all the parties were contracting with each other with equal knowledge that the wife was then entitled under two known wills, the one English and the other American, and they expressly made

(1) 2 Y. & C. Ch. Cas. 121.

H. L. (E.) 1884 WILLIAMS v. MERCIER. Earl of Selborne, L.C.

the settlement of the property under the English will and said nothing whatever about the American, and there was a general covenant of this sort in words of futurity. I think it was a very reasonable thing at all events and not surprising, even if the words "if any," which are words of uncertainty, had not been added, to construe that as meaning only what the husband should acquire a right to by reason of an after-acquired title of the wife.

It is not necessary to go through the cases, or to express any opinion upon them, but it is probable that in other cases in which a similar conclusion was arrived at the reason was the same. If the words are capable of the sense of which I think they are capable, and which in some of the authorities has been placed upon similar words, whether those authorities were rightly decided or not, the question for your Lordships is whether that is the true sense of the words in this settlement; and that is to be ascertained, not from a context of words more or less dissimilar in some other settlement, but from the whole contents of this settlement. I am of opinion that the words are capable of such a sense. I do not say that they bear it so clearly, that it might not be repelled by a context, or even by extrinsic circumstances looked at in connection with the context, which would tend to repel it; but we have to consider what we have here. Looking at the immediate context only, as far as I can form an opinion, I think that there might be something to be said on both sides, but certainly the construction is not repelled by any particular words which would exclude these articles. And we find later on in the same instrument words which appear to me most plainly and expressly to shew that it was meant to include these things—words which must be rejected if these things are not included; because in a clause referring to this very covenant or part of the agreement it is said that the trustees shall have power to sell securities under this very portion of the settlement, and then that "the money to arise from such sale shall be held and applied upon the trusts, and with and subject to the powers, provisoes, agreements, and declarations hereinbefore declared and contained concerning such part of the personal estate of or to which the said Florence Farquharson now is, or she or the said

T. A. H. Williams in her right shall become possessed or entitled as aforesaid." Those words "now is" are unambiguous; and they declare expressly, that in the view of the parties the previous powers, provisoes, agreements and declarations as to the wife's property relate not only to property which shall come to her or to her husband in her right by a future title, but also to property of which she at that very time was possessed, or to which she was then entitled. Whether or no the draftsman intended to make use of similar words in the previous clause is a point upon which your Lordships can have no legitimate means of information. But supposing that he did not, supposing that you are to take, as probably you ought to take, the instrument simply as it stands, the first words to which I have referred are, in my judgment, at least susceptible of a construction, a reasonable and grammatical construction, which would include the property to which this lady was at that time entitled; and those words which occur in the later part of the settlement expressly shew, that all the parties to the instrument executed it upon the understanding and with the intention that the covenant should have that effect.

I therefore conclude that the judgment of the Court of Appeal is right and ought to be affirmed, and the appeal dismissed with costs, and I move your Lordships accordingly.

LORD BLACKBURN:—

My Lords, I am of the same opinion. I think the sole question is, What is the meaning of this particular settlement in the words and the manner in which the settlement has been drawn? It was competent to the parties, if by apt words they had expressed an intention to do so, to have said that the property which belonged to Florence Farquharson before her marriage which would, if there had been no provision to the contrary, upon her marriage have become her husband's by virtue of the marriage, should not come to her husband but should be settled, either the whole or any part of it, to her separate use or to some other purpose.

Now the first question is, Do these words here used mean that? I think myself that if there had been nothing more in them than this, "It is hereby agreed and declared that all real and personal

H. L. (E.) 1884 WILLIAMS v. MERCIER. Lord Blackburn.

property to which the said Florence Farquharson shall become entitled during her now intended coverture," they would not have included that which was already hers. The words there would have meant that which would be future property, what she would become afterwards entitled to. But it is said " or the said T. A. H. Williams in her right at any time during her now intended coverture shall become entitled." There arises a considerably more difficult question, to say upon the face of it what that means. When the wife by marrying the husband caused the property which was hers to become his, I cannot bring myself to doubt that in one sense of the words he did become entitled to it in her right, and he became entitled to it in her right at the one indivisible instant when the coverture commenced; and I think that the words " at any time during her now intended coverture " might apply to those things which became vested in him, became his in her right, at the very instant when the coverture commenced, and contemporaneously with it. It is something like the old case which was so much discussed in Plowden's Commentaries, whether a man who committed suicide forfeited the property by having killed himself during his lifetime or not (1). The indivisible instant when he became dead is, I think, like the indivisible instant when the coverture commenced, which might, I think, be included under the words in the instrument " at any time during her now intended coverture."

At the same time I think that that is by no means the clear and obvious construction, and I think that a very little circumstance may shew that it was not intended to include that, but was intended to be confined to things in futuro altogether, to such property as she might acquire afterwards. It does no doubt at the first blush seem an injudicious thing (and I would certainly say that if the parties had thought of it they would have provided against it) to say that when the bride expects that some friend is going to leave her a legacy, if that friend dies within a short time before the marriage is actually celebrated, the husband shall take it, but if he dies an hour afterwards when the marriage has actually taken place it shall be settled. Nevertheless, although the parties would have been very injudicious in so

(1) *Hales* v. *Petit*, Pl. Com. 258–264 a.

wording the instrument, they may have done it so as to have embraced that case.

In the cases which have been cited there was always something which tended to shew that it was not intended to include property which was the intended wife's property already. What it was differs in different cases. I think a conveyancer drawing a settlement of this kind would do well to use a word or two to shew what was intended in order that there should be no doubt about it. Such a word or two ought in my opinion to have been used in the present case. If the words which were inserted later, namely, all property "of or to which the said Florence Farquharson now is or she or the said T. A. H. Williams in her right shall become possessed or entitled," had been inserted in the earlier declaration there could not have been a doubt that it was intended that all her property, both what is hers now and what shall come to her at any time after her marriage, shall be settled.

There might have been something to shew that the parties purposely left them out, or that the intention was that they should not be introduced at that point. But nothing of the sort occurs until we come to the later clause, where we are distinctly told that when the property there described is sold and the trustees have got the money, the property is to be resettled in the same way as "hereinbefore declared and contained concerning such part of the personal estate of or to which the said Florence Farquharson now is or she or the said T. A. H. Williams in her right shall become possessed or entitled as aforesaid." That certainly seems to me a clear and distinct declaration of the intention of the parties, that they had before declared and settled the manner in which the money that she now is possessed of shall be settled. It to my mind can have no other meaning put upon it than that which it would have if the words "now is" had been introduced in the earlier declaration. Although the words are put in an awkward place they make it perfectly clear, and that being so I think that the jewelry and other articles in question, which were certainly the property of the wife, come under the covenant that they were to be excepted from the property conveyed to the trustees for the purposes of the marriage settlement, and are within the exception that they are to be for the separate

H. L. (E.) 1884 WILLIAMS v. MERCIER.

use of Florence Farquharson. That being so, the judgment creditor had the right to seize them, and I think that this appeal should be dismissed with costs.

LORD BRAMWELL:—

My Lords, I am entirely of the same opinion. The question is whether this property is within the clause which says "except jewels, trinkets, ornaments of the person" and so forth, "which it is hereby declared shall belong to the said Florence Farquharson for her separate use." Now that of course comprehends the chattels in question—in words, I mean—but it is said that it cannot do so in reality for this reason, that it is an exception, and an exception can only apply to that which but for the exception would have been within the previous provision from which the exception is made; and it is said that the previous provision relates (to express it shortly) to after-acquired property. Cogent arguments have been used in support of that contention, and weighty authorities cited also. I should have been inclined to say that but for the clause to which I am about to refer it would be a difficult question. But, assuming that the argument is well founded, that the clause from which the exception is made applies to future-acquired property only, I find that nevertheless there is this clause: "Subject to the powers, provisoes, agreements and declarations hereinbefore declared and contained concerning such part of the personal estate of or to which the said Florence Farquharson now is, or she or the said T. A. H. Williams in her right shall become possessed or entitled as aforesaid." That is a statement in the deed that there are powers, provisoes, agreements and declarations with respect to the property of which the lady was *then* possessed. Now the only power, proviso, agreement, or declaration as to any property of which she was then possessed is that which is contained in the exception; and therefore it seems to me that that subsequent clause to which I have referred clearly shews that the exception excepts something more than was contained in the preceding clause if that preceding clause is to be limited as the appellant contends.

Well, but then that shews that the exception was badly drawn, that it was inaccurate and bad English, not ungrammatical, but

that it was bad English in this sense, that it excepted something which was not previously included; and then the learned counsel for the appellant, especially Mr. Chester, have said, Conclude from that that the later clause is wrong, reject the words "now is," and treat it as an idle statement which is capable of no application. Now I, on the contrary, feel perfectly satisfied that the later clause represents the real intention of the draftsman, and that it is by inadvertence that he has not worded his exception in such a way as to include this property in the earlier clause.

I am therefore of opinion that the judgment of the Court below is right and should be affirmed.

LORD FITZGERALD:—

My Lords, the doubt which I entertained on the construction of the settlement as to the declaration and agreement for the settlement of the wife's property has been so far removed by reference to the trusts concerning "the personal estate to which Florence Farquharson *now is*, or she or her intended husband in her right shall become entitled," that I have come to the conclusion that the construction adopted by the Court of Appeal is correct and entirely supports the decision of that Court.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 4th November 1884.

Solicitors for appellant: *Griffinhoofe & Brewster.*
Solicitors for respondent: *Lewis & Lewis.*

[HOUSE OF LORDS.]

H. L. (I.) 1884 Nov. 20.

THE COMMISSIONERS OF CHURCH TEMPORALITIES IN IRELAND (continued in the name of the Irish Land Commission) . . . . . } Appellants;

AND

PATRICK GRANT and Others . . . Respondents.

Tithe Rent-charge in Ireland—Non-payment for more than Twenty Years—Statute of Limitations (3 & 4 *Wm.* 4 *c.* 27) *ss.* 1, 2, 29—1 & 2 *Vict. c.* 109.

The right to tithe rent-charge in Ireland was vested in a spiritual corporation sole until 1871, when it was transferred by statute to a lay corporation. In 1877 the lay corporation brought an action against the persons liable to pay tithe rent-charge to recover six years arrears. For more than twenty years next before action there had been no payment and no acknowledgment in writing:—

Held, affirming the decision of the Irish Court of Appeal, that tithe rent-charge was "rent" within sect. 1 of the Statute of Limitations (3 & 4 Wm. 4 c. 27) and not a "composition" within the exception to sect. 1, compositions in Ireland having been abolished by 1 & 2 Vict. c. 109; that sect. 2 of 3 & 4 Wm. 4 c. 27 applied as between the owner and the persons liable to tithe rent-charge; that the lay corporation could not avail themselves of the provisions of sect. 29 in favour of spiritual corporations sole; and that the action was barred by the lapse of twenty years (1).

Appeal from an order of the Court of Appeal (Ireland) (2).

The bill of complaint filed the 4th of December 1877 by the Commissioners of Church Temporalities in Ireland contained the following allegations:—

On the 11th of October 1827 a statutable composition for all tithes within the parish of Faughart, in the county of Louth, was made, and its entire annual amount was fixed by a certificate of that date at the sum of £250 payable to the then rector of the parish. This composition was afterwards assessed and applotted on each parcel of the titheable lands within the parish. By

(1) By the Real Property Limitation Act 1874 (37 & 38 Vict. c. 57), which came into operation on the 1st of January 1879, the period of limitation is twelve years.

(2) Ir. L. R. 11 Ch. D. 430.

reason of the premises and by force of 1 & 2 Vict. c. 109 such parcels became liable to be charged with the payment of an annual rent-charge of £187 10*s.*, equal to three-fourths of the annual amount of the aforesaid composition. This tithe rent-charge became by virtue of the Irish Church Act 1869 (32 & 33 Vict. c. 42) vested in and payable to the plaintiffs from the 1st of January 1871.

The bill then alleged that the various defendants had respectively such an estate in lands within the parish as rendered them liable to the payment of tithe rent-charge, and claimed arrears for six years ending the 1st of November 1877.

Paragraph 12 of the amended statement of defence alleged that the right to bring an action or make a distress or entry for the recovery of the tithe rent-charge sued for accrued to a spiritual corporation sole, then being the parson of the parish of Faughart, upwards of twenty years next before the commencement of the action, and that for upwards of twenty years next before the commencement of the action neither tithe rent-charge nor anything on account thereof, nor any acknowledgment in writing of the right thereto, was paid or given to the plaintiffs or any person through whom they claimed by the defendants or any person through whom they claimed, signed by them or any of them.

The plaintiffs demurred to paragraph 12.

[By an order made on the 17th of December 1881 it was ordered that the proceedings be carried on by the Irish Land Commission, to whom the property vested in the Commissioners of Church Temporalities was transferred by the Irish Church Act Amendment Act 1881 (44 & 45 Vict. c. 71).]

Sir E. Sullivan M.R. allowed the demurrer. The Court of Appeal (Lord Chancellor Law, and Fitzgibbon L.J., Palles C.B. dissenting) reversed this decision and overruled the demurrer (1).

Aug. 1, 4, 5. *The Solicitor-General for Ireland* (*S. Walker* Q.C.) and *D. H. Madden* Q.C. (*H. Brougham Leach* with them), all of the Irish Bar, for the appellants:—

The Statutes of Limitations apply only as between adverse claimants of estates in tithes and not between the tithe owner

(1) Ir. L. R. 11 Ch. D. 430.

H. L. (I.) 1884 IRISH LAND COMMISSION v. GRANT.

and the tithe payer: *Dean of Ely* v. *Bliss* (1), and the same principle applies to composition, and rent-charge in lieu of tithes, which are statutable tithes within the meaning of 3 & 4 Wm. 4 c. 27.

It is clear that nonpayment of tithes for any period, however long, could not have been relied on as a defence to an action for tithes prior to 2 & 3 Wm. 4 c. 100: nullum tempus ecclesiæ; and as to lay tithes it was decided by this House that there could be no prescription in non decimando against a lay impropriator: *Andrews* v. *Drewer* (2). Six years arrears only were recoverable under 54 Geo. 3 c. 68 s. 5, but the right of the tithe owner was never barred by lapse of time. It was always necessary when exemption was claimed to prove a legal origin, as by proving that the lands had belonged to one of the greater monasteries suppressed by Henry VIII. This necessity was removed by Lord Tenterden's Act (2 & 3 Wm. 4 c. 100), which was finally decided after some differences of opinion to have legalized the proof of "a modus decimandi, or exemption from, or discharge of tithes" by mere evidence of nonpayment for the prescribed period, without proof of a legal origin for the exemption: *Salkeld* v. *Johnston* (3). This statute is therefore in a certain sense a statute of limitations between tithe owner and tithe payer, supplying a defence founded on lapse of time (see per Lord St. Leonards, *Dean of Ely* v. *Bliss*) (4).

In this state of the law, the Statute of Limitations 3 & 4 Wm. 4 c. 27 was passed, including in the definition of "land" tithes other than tithes vested in a spiritual or eleemosynary corporation sole. When it passed, tithe rent-charge had no existence. In England tithes were still payable in kind, and it was finally decided that the statute did not apply as between tithe owner and tithe payer, mainly on the ground that 2 & 3 Wm. 4 c. 100 (which was unrepealed) had dealt in a different manner as between the tithe owner and tithe payer with the question of exemption by lapse of time: *Dean of Ely* v. *Bliss* (1).

In Ireland a series of Acts had been passed for the purpose of establishing a composition in lieu of tithes with a view to its

(1) 2 D. M. & G. 459.
(2) 3 Cl. & F. 314, 327.
(3) 1 Mac. & G. 242.
(4) 2 D. M. & G. 469.

subsequent commutation into a rent-charge. Goulburn's Act (4 Geo. 4 c. 99) established a voluntary composition for a period of twenty-one years, issuing out of land. This composition is expressly declared to be "tithes" for all intents and purposes (sect. 50). Then followed Stanley's Act (2 & 3 Wm. 4 c. 119) which rendered compulsory and universal the same composition which was already declared to be statutable tithes. In another statute of the same code (3 & 4 Wm. 4 c. 100 s. 40) "tithes" are defined as including "any composition for tithes." Having regard to this series of enactments, the statutory composition then existing in Ireland falls within the definition of "tithes" in the Statute of Limitations, and not within that of "rent," although it was a periodical payment issuing out of land. It was indeed admitted in the argument in the Courts below that the statute would not bar tithe composition, the argument being based on the subsequent conversion of this composition into a rent-charge by the Tithe Rent-charge Act (1 & 2 Vict. c. 109). But the composition was a "rent-charge" though not so called, or at all events "rent" within the Statute of Limitations as "a periodical payment issuing out of land." There was no conversion of one kind of property into another (as of land into money), but the substitution of one kind of statutable substitute for tithes into another, of lesser amount, and payable by the owners of different estates in land. The identity of the rent-charge with the composition and with tithes, is declared by sect. 24 of 1 & 2 Vict. c. 109 (see also sects. 1, 7 and 27). This statute and the composition Acts are one code and should be read together as being in pari materiâ: This principle has been already applied to those Acts: *Saunderson* v. *Stoney* (1) and *Madden* v. *Wilson* (2) in which cases sect. 27 of the Tithe Rent-charge Act has been interpreted by reference to the corresponding section in Goulburn's Act. The conversion should not be carried farther than is required to give effect to the statute: *Gore* v. *O'Grady* (3); *Eyre* v. *McDowell* (4). There is nothing to shew that the legislature intended by the mere conversion of one rent-charge into another to bring the church property in tithes within the Statute of Limitations from which

(1) 2 Ir. Eq. 153.
(2) 6 Ir. Jur. 129.
(3) Ir. L. R. 1 Eq. 1.
(4) 9 H. L. C. 619.

H. L. (I.) 1884 IRISH LAND COMMISSION v. GRANT.

they had been expressly excepted. On the contrary the Tithe Rent-charge Act (ss. 18, 19) deals with the effect of nonpayment as between owner and payer on a similar principle to that adopted in England by 2 & 3 Wm. 4 c. 100. Even if the tithe rent-charge were held to be a "rent" and not "tithes" within the Statute of Limitations, the principle of *Dean of Ely* v. *Bliss* (1) applies, otherwise there would be two inconsistent enactments prescribing different periods of time by proof of nonpayment for which an owner of land may resist a claim for tithe rent-charge.

The decision appealed from overrules the law as laid down in *Sheil* v. *Incorporated Society* (2) decided in 1847, and *Netterville* v. *Power* (3) in 1860. In the former case Smith M.R. applied the same principles which ultimately prevailed in *Dean of Ely* v. *Bliss* (1) to a claim composed of tithes, composition, and rent-charge. In *Netterville* v. *Power* (3) the amount claimed consisted exclusively of tithe rent-charge. These decisions have become part of the property law of Ireland.

Further, in the present case the rent-charge sued for was vested in an ecclesiastical corporation sole up to the 1st of January 1871. So long as it was so vested it was excluded from the definition both of "land" and "rent" in sect. 1 of 3 & 4 Wm. 4 c. 27. The tithe rent-charge is a "composition" within this section as well as the statutable compositions then existing in Ireland. The word "composition" cannot be restricted to the compositions real, which alone existed in England. Unless the word has this restricted meaning, it must include the tithe rent-charge, which like the former composition is a rent-charge legally substituted for tithes in kind by way of statutable composition. In this view the decision of Sullivan M.R. and Palles C.B. is correct. There is an error in the report of the judgment of the former at 11 L. R. Ir. p. 435. But even admitting that the tithe rent-charge would be governed by the 29th and not the 2nd section of 3 & 4 Wm. 4 c. 27, there is an equal departure from the declared intention of the legislature, which is to exclude altogether from the Act tithes, or what legally represents tithes, so long as vested in an ecclesiastical corporation sole.

(1) 2 D. M. & G. 459. (2) 10 Ir. Eq. 411.
(3) 6 Ir. Jur. (N.S.) 123.

E. Cuming (of the Irish Bar) for the respondents:—

There are two questions involved in the present appeal, 1, whether the rent-charge created by 1 & 2 Vict. c. 109 is tithe or composition for tithe within the meaning of the exception in sect. 1 of 3 & 4 Wm. 4 c. 27 and therefore outside that Act; and 2, whether assuming that it is neither tithe nor composition for tithe sect. 2 of 3 & 4 Wm. 4 c. 27 applies to the plaintiffs' claim in this case, seeing that the tithe rent-charge claimed in the present action was vested in an ecclesiastical corporation sole up to 1871, and the action was commenced in 1877. There is also a subordinate question, namely, assuming tithe rent-charge to be a composition for tithe, whether even then sect. 2 of 3 & 4 Wm. 4 c. 27 would not bar the plaintiff's claim, since at the time of action brought this tithe rent-charge was claimed by a lay corporation aggregate as lay tithe rent-charge.

Tithes, modus, and compositions real (to which alone probably the exception in sect. 1 of 3 & 4 Wm. 4 c. 27 refers) existed throughout Ireland up to 1823, the date of 4 Geo. 4, c. 99 (Goulburn's Act), when a statutory "composition" payable by the occupiers of lands (sect. 38) was created to some extent, to last for twenty-one years only, after which date tithes were to revive. By 2 & 3 Wm. 4 c. 119 (Stanley's Act) this "composition" was made perpetual and extended all over the country. That Act recites that it was desirable to establish a statutory composition for tithes with a view to a commutation thereof. 1 & 2 Vict. c. 109 recites an intention to abolish tithes and tithe composition, and proceeds to carry out that intention. The old composition and the new rent-charge are opposed thoughout the Act. The real nature and essence of a "composition," properly so called, was that it arose from an actual or presumed arrangement and composition amongst the parties concerned, and the statutory compositions differed in essence and nature from compositions properly so called, but Goulburn's Act and Stanley's Act did for convenience apply the term "composition" to the annual payments created by those Acts.

The tithe rent-charges created by 1 & 2 Vict. c. 109 also want the essence and nature of compositions properly so called, and the statute does not call them compositions. They differed from

H. L. (I.) 1884

IRISH LAND COMMISSION v. GRANT.

the Stanley composition in being payable by the persons having the first perpetual estate in the lands charged.

Both tithes and compositions for tithe are for ever abolished by 1 & 2 Vict. c. 109, and an ordinary rent-charge is created in lieu thereof. This process is the "commutation" contemplated by 2 & 3 Wm. 4 c. 119, and is spoken of in sect. 33 of 1 & 2 Vict. c. 109 as "conversion," which is the term used in law to describe the most complete change, as from land into money or vice versâ, or from a lease for lives to a fee simple (12 & 13 Vict. c. 105). By sect. 18 of 1 & 2 Vict. c. 109 a statute of limitation is created as to *tithes* (similar to 2 & 3 Wm. 4 c. 100 in England) but only of a temporary nature and for the purpose of ascertaining whether tithe rent-charge should attach and to what amount, to any particular lands. It provided an easy and cheap mode of ascertaining whether land should be treated as free of tithe, and in consequence of such freedom that tithe rent-charge should not attach thereto. The landowner was to shew that prior to the establishment of statutory composition by Goulburn's Act or Stanley's Act his lands had during a certain number of years been held free of tithe. That proof had to cover a prescribed number of years while tithe had an actual general existence and had not yet been abolished. That section had no application to tithe rent-charge when the latter should come into existence, it only provided what evidence should suffice to shew that the lands were at all times free of tithe and therefore that no tithe rent-charge should attach thereto. The 16th section of that Act provides that a landowner can present a summary petition to the Court of Chancery to have his land declared to have been *tithe free*. Sect. 24 of 1 & 2 Vict. c. 109 is a mere distribution section.

Sheil v. *Incorporated Society* (1) was a proceeding under that 16th section. No question properly arose there as to the extinguishment of tithe rent-charge by nonpayment thereof, and as tithe rent-charge had only been eight years in existence at that date no such question could have arisen. The judge there ignores this fact; he also speaks erroneously of sect. 18 of 1 & 2 Vict. c. 109 as a continuing and permanent Statute of Limitation applicable to tithe rent-charge when created; also of *Grant* v. *Ellis* (2), as shewing

(1) 10 Ir. Eq. 411.

(2) 9 M. & W. 113.

that 3 & 4 Wm. 4 c. 27 does not apply to ordinary rent-charges; and of statutes of limitations applicable only to tithes as being applicable also to ordinary rent-charges. In *Netterville* v. *Power* (1) which was an action to recover tithe rent-charge, the same judge ignores *James* v. *Salter* (2) and *De Beauvoir* v. *Owen* (3) (which decided that 3 & 4 Wm. 4 c. 27 applies to ordinary rent-charges), and treats *Sheil* v. *Incorporated Society* (4) as deciding that 3 & 4 Wm. 4 c. 27 does not extinguish tithe rent-charge and as binding him so to hold. In the meantime between those two decisions the Lord Chancellor of Ireland had in *Ecclesiastical Commissioners* v. *Marquis of Sligo* (5) decided that 3 & 4 Wm. 4 c. 27 ss. 1, 42 did apply to tithe rent-charge. This case is quoted by Lord St. Leonards as an authority for that point: Sugden, Vendors and Purchasers (6), and by Dart, Vendors and Purchasers (7). Hall V.-C. in *Attorney-General* v. *Earl of Durham* (8), expresses an opinion that 3 & 4 Wm. 4 c. 27 s. 29 applies to tithe rent-charge under 6 & 7 Wm. 4 c. 71 vested in an ecclesiastical corporation sole. *Sheil* v. *Incorporated Society* (4) is not a decision in favour of the plaintiffs, and carries little weight as an opinion owing to the erroneous grounds relied on. *Netterville* v. *Power* (1) simply follows the former case and has no higher authority.

Ecclesiastical Commissioners v. *Rowe* (9) decides that when a lay corporation sues to recover lands formerly vested in an ecclesiastical corporation sole and transferred by statute to the lay corporation, the period of limitation that the defendant can rely on in bar of that action is the twenty years fixed by 3 & 4 Wm. 4 c. 27 s. 2, not the longer period fixed by sect. 29. It was pointed out there that if the ecclesiastical corporation sole had been out of possession for twenty years before the statutory transfer, the transferees might by the fact of the transfer fail to have any right to recover lands which the ecclesiastical corporation would have had many years to sue for. In the same case in the House of Lords (10) this decision was by a majority

(1) 6 Ir. Jur. (N.S.) 123.
(2) 3 Bing. (N.C.) 544.
(3) 5 Ex. 166.
(4) 10 Ir. Eq. 411.
(5) 5 Ir. Ch. 46.
(6) 13th Ed. p. 406.
(7) Vol. i. 5th Ed. p. 398.
(8) 46 L. T. (N.S.) 20.
(9) 4 Q. B. D. 63.
(10) 5 App. Cas. 736.

H. L. (I.) 1884 IRISH LAND COMMISSION v. GRANT.

of the House reversed on a very special section in the transferring Act, 3 & 4 Vict. c. 113 s. 57. But all the judgments in this House recognise that but for this special section giving the lay corporation the benefit of sect. 29 of 3 & 4 Wm. 4 c. 27, the decision of the Court of Appeal would have been upheld notwithstanding the result therein pointed out. No such special section exists in the Irish Church Act 1869; the transfer section (sect. 12) is a simple transfer of the property.

Even if this tithe rent-charge had during the existence of the Irish Church been a "composition for tithe belonging to an ecclesiastical corporation sole," within the meaning of the exception from 3 & 4 Wm. 4 c. 27 sect. 1, it cannot be said to be so any longer; it is sued for as lay tithe rent-charge, and if the plaintiffs' title be established thereto it will be a lay tithe rent-charge that the plaintiffs will then have. It is therefore the twenty years limitation provided by 3 & 4 Wm. 4 c. 27 s. 2, that should be applied to bar the plaintiffs' action.

[EARL OF SELBORNE L.C.:—Mr. Cuming's very able argument calls for a reply.]

Madden Q.C. in reply:—

Ecclesiastical Commissioners v. *Rowe* (1) has no application. The subject-matter was land, admittedly within the Statute of Limitations, and the question was whether the 2nd or the 29th section applied to the plaintiffs' claim, having regard to the 37th section of 3 & 4 Vict. c. 113. *Attorney-General* v. *Earl of Durham* (2) was decided independently of the Statute of Limitations. As to *Sheil* v. *Incorporated Society* (3), no doubt Smith M.R. appears to assume that the statute does not apply as between the owner and payer of an ordinary rent-charge. But the ground of his decision is the principle adopted by Lord St. Leonards in *Dean of Ely* v. *Bliss* (4), reversing the decision of Lord Langdale (5). This also appears from his judgment in *Netterville* v. *Power* (6), which he treats as raising the same question as *Sheil* v. *Incorporated Society* (3), although *De Beauvoir* v. *Owen* (7) was

(1) 5 App. Cas. 736.
(2) 46 L. T. (N.S.) 16.
(3) 10 Ir. Eq. 411.
(4) 2 D. M. & G. 459.
(5) 5 Beav. 574, 581.
(6) 6 Ir. Jur. (N.S.) 123.
(7) 5 Ex. 166.

cited in argument, and it further appears from this case that he must have considered tithe rent-charge as identical with tithes and compositions for the purpose of the Statute of Limitations, otherwise he would not have said that he was called on to overrule the decision of Lord St. Leonards in *Dean of Ely* v. *Bliss* (1). The decision in *Netterville* v. *Power* (2) has been more than acquiesced in. Titles have been accepted on its authority without requiring proof of actual payments, and it cannot be overruled without subverting such titles. As to the various particulars pointed out on the other side in which the tithe rent-charge differs from tithes and compositions, it will be found that the difference is in each case necessary in order to work out the policy of the Tithe Rent-charge Act. It is not like the conversion of land into money, which is done for the purpose of altering the nature of the property. The conversion is for the purposes of the Act, and should not be carried further. The argument founded on the word "abolish" in sect. 1 is met by sects. 12 & 33, which use the more appropriate term "conversion." The entire code of Acts are in pari materiâ.

The House took time for consideration.

Nov. 20. EARL OF SELBORNE L.C.:—

My Lords, in this case the question (which arose upon demurrer) is, whether the right of the Irish Land Commission to recover certain sums claimed to be due from the defendants as tithe rent-charge in arrear, in respect of lands in their occupation, situate in the parish of Faughart, in the county of Louth, was barred, when the present suit was commenced, by sect. 2 of the Statute of Limitations (3 & 4 Wm. 4 c. 27).

The right to tithe rent-charge was vested in the rector of the parish, a spiritual corporation sole, down to the 1st of January, 1871, when, by virtue of the Irish Church Act of 1869, it was transferred to the plaintiffs (appellants here) a lay corporation. The suit was instituted, in the Court of Chancery of Ireland, on the 4th of December, 1877. The defendants by the 12th paragraph of their amended statement of defence (to which the

(1) 2 D. M. & G. 459. (2) 6 Ir. Jur. (N.S.) 123.

H. L. (I.) 1884 IRISH LAND COMMISSION v. GRANT. Earl of Selborne, L.C.

plaintiffs demurred) averred that the right to bring an action, or make a distress or entry, for the recovery of this tithe rent-charge, accrued to the spiritual corporation sole, through whom the plaintiffs claimed, upwards of twenty years next before the commencement of the action, and that there had since been no payment on account and no acknowledgment in writing.

The then Master of the Rolls, Sir Edward Sullivan, on the 29th of March 1882, allowed the demurrer, following and approving a previous decision of Smith M.R. in *Netterville* v. *Power* (1) which proceeded on the ground that the Statute of Limitations did not apply as between the owner (whether lay or spiritual) of a tithe rent-charge and the person liable thereto, but only as between adverse claimants of the incorporeal hereditament.

In the Court of Appeal this decision was reversed by the late Lord Chancellor Law and Fitzgibbon L.J., Palles C.B. dissenting. The Chief Baron did not rely upon the same ground of judgment with the Master of the Rolls. He rested his opinion upon the view that tithe rent-charge is a "composition" within the meaning of that word, as used in the interpretation clause (sect. 1) of the Statute of Limitations; and that, in this case, there was no "rent" within the meaning of the statute, in respect of which a cause of action did or could accrue to any person, until it became vested in the plaintiffs themselves, on the 1st of January 1871, less than seven years before the commencement of the suit.

It will be convenient first to consider the cases before Smith M.R., on which Sir Edward Sullivan in some measure relied; though he said that he should have arrived, independently, at the same conclusion.

Mr. Smith appears to have considered that the question which arose for determination in *Netterville* v. *Power* (1) was substantially the same with that which he had himself decided in an earlier case of *Sheil* v. *Incorporated Society* (2) and which Lord St. Leonards also decided in the *Dean of Ely* v. *Bliss* (3). With that view I cannot agree. The Irish Tithe Commutation Act, by which tithe rent-charge was substituted for tithe, was passed in 1838; *Sheil* v. *Incorporated Society* (2) was decided in 1847.

(1) 6 Ir. Jur. (N.S.) 123. (2) 10 Ir. Eq. 411.
(3) 2 D. M. & G. 459.

Whether the tithe rent-charge was "rent" or "tithes" within the meaning of the Statute of Limitations, was a point which it was unnecessary in that case to determine, because the right could not be barred, unless the statute had began to run against it while it was in every sense, and for every purpose, a right, not to rent-charge, but to tithes. If there was a temporary composition under Mr. Goulburn's Act (which was in force from 1823 to 1832) the nature of the tithe owners' right was not changed thereby.

Whatever, therefore, may be thought of some of the dicta in *Sheil* v. *Incorporated Society* (1), the decision in that case was justified upon the same ground as that in the *Dean of Ely* v. *Bliss* (2) before Lord St. Leonards. That was a case of tithes, vested in an ecclesiastical corporation, not sole, but aggregate, and therefore within the interpretation of the word "land" contained in the 1st section of the statute. Lord St. Leonards decided, in substance, that the word "land," as extended by that section to "tithes," meant the incorporeal hereditament vested in the tithe owner, and not the reddendum to be made by the tithe payer; just as, in its ordinary sense, it signifies the corporeal hereditament to which a landowner has title, and not his claim against an occupier for rents or profits. His Lordship founded this conclusion partly on a comparison between this statute and another Act (2 & 3 Wm. 4 c. 100) passed in the preceding year, "for shortening the time required in claims of modus decimandi, or exemption from or discharge of tithes," which dealt directly with the question between tithe owner and tithe payer; and partly on a critical examination of the Statute of Limitations itself. Some parts of his reasoning on the language of the Statute of Limitations are more clear and satisfactory than others; to myself the most satisfactory part is contained in the following sentence:—"Unless there is some reason against it, if land represents tithes, tithes, being to be represented by land, must be subject to the same rule of construction, and open to the same interpretation, as land itself" (3). It is true that, in the immediate context of that sentence, and elsewhere in the same

(1) 10 Ir. Eq. 411. (2) 2 D. M. & G. 459.
(3) 2 D. M. & G. 473.

H. L. (I.) 1884

IRISH LAND COMMISSION v. GRANT.

Earl of Selborne, L.C.

judgment (1) he also reasons from the case of "rent" to that of "land," and says that "rent means the subject of inheritance."

But I do not think it is necessary to suppose that, on this point, his view was different from that of the Court of Exchequer in *Grant* v. *Ellis* (2), a case observed upon by Smith M.R. in *Sheil* v. *Incorporated Society* (3) in a manner which leaves me in doubt, whether he did not understand it in a sense inconsistent with *James* v. *Salter* (4). The point decided in *Grant* v. *Ellis* (2) was, that the word "rent" in the statute did not mean a conventional rent reserved by a lease; which is undoubted law. Among other reasons for that conclusion, one was founded upon the use of the word "recover" in the 2nd section, which the Court considered to refer to "that sort of recovery" which before the passing of the Act was open to a "a party seised of rents, whether rents-service, rent-charges, or rents-seck," who might, "in case the rent was paid to another, or withheld from him, consider himself, if he thought fit, as being disseised of such rent," and who, "electing to consider himself so disseised, might have the same remedy by an assize to recover seisin of his rent, as a party disseised of land might have to recover seisin of his land; the judgment in each case being the same, quod recuperet seisinam." I am far from understanding this (as Smith M.R. appears to have understood it, see 10 Irish Equity, page 418), as meant to imply, that the application of the statute, in cases of rent, as between the owner of the rent and the person "withholding" it "from him," could, after the abolition of real and mixed actions by sect. 36 of the same statute, depend, in any way, upon the form of proceeding for the assertion or recovery of the right.

If it had been said in *Grant* v. *Ellis* (5), as to rents of inheritance generally, that the second section of the statute did not apply to any case of mere non-payment of rent, or to any action by the owner of a rent against the person liable to pay it, it would be necessary to determine whether this, or the contrary law laid down in the prior case of *James* v. *Salter* (4), and the subsequent

(1) 2 D. M. & G. 472.
(2) 9 M. & W. pp. 122, 123.
(3) 10 Ir. Eq. pp. 417, 418.
(4) 3 Bing. N. C. 544.
(5) 9 M. & W. 113.

case of *Owen* v. *De Beauvoir* (1), was correct. There can be no doubt, I think, of the correctness of the decisions in *James* v. *Salter* (2) and *Owen* v. *De Beauvoir* (1); which determined that the right to distrain or bring an action for a quit rent, or other perpetual rent, is within the second and third sections of the statute, and may be barred by non-payment for twenty years before distress or action. Rolfe B., who delivered the judgment in *Grant* v. *Ellis* (3), concurred in the decision of *Owen* v. *De Beauvoir* (1), which was affirmed in the Exchequer Chamber. The mere use of the word "distress" (as well as "entry" and "action"), in the second section, would have appeared to me to shew that this must have been the intention of the legislature. This question, it is to be observed, is altogether independent of the origin of the rent, and of the difference between a lay and an ecclesiastical title thereto.

The cases, therefore, of *Sheil* v. *Incorporated Society* (4), and *Dean of Ely* v. *Bliss* (5), are not (as Smith M.R. assumed them to be) authorities for the decision in *Netterville* v. *Power* (6).

It must now be considered whether that decision can be supported upon the ground, on which it was approved by Sir Edward Sullivan; viz., that the Irish Tithe Commutation Act ought to be construed as giving to the person entitled to the rent-charge substituted for tithe the same time for recovering the tithe rent-charge as he had for recovering the tithe.

The first reason assigned by Sir Edward Sullivan for that conclusion appears to have been founded upon the doctrine, "that, when a man by his will gives a legacy, and substitutes for it another legacy by a codicil, the legacy given by the codicil has all the conditions, remedies, limitations, and disqualifications attached to it which the original legacy had;" which his Lordship considered to be in point, because "the settled principles of construction which apply to wills are the same as those which apply to statutes." But the only principle of construction on which the doctrine so referred to (in the cases to which it is really applicable) depends, is that of discovering the intention of a

(1) 16 M. & W. 547; 5 Ex. 166.
(2) 3 Bing. N. C. 544.
(3) 9 M. & W. 113.
(4) 10 Ir. Eq. 417.
(5) 2 D. M. & G. 459.
(6) 6 Ir. Jur. (N.S.) 123.

H. L. (I.) 1884 IRISH LAND COMMISSION v. GRANT. Earl of Selborne, L.C.

testator from the words which he has used. Applying that principle to the Irish Tithe Commutation Act (1 & 2 Vict. c. 109), it is, in the first place, quite certain, that the intention of the legislature was not to give to the rent-charge (thereby substituted for tithes) "all the conditions, remedies, limitations and disqualifications" attached to tithes. On the contrary, the liability to the new rent-charge (representing three-fourths of the old tithe, or composition), was imposed upon different lands and persons, in a new manner. The former remedies (principally ecclesiastical) were not preserved; new remedies by distress and otherwise were given; and, instead of leaving an intention to apply the old law of tithes, generally, to the new rent-charge to be collected by any kind of implication or inference, the Act contains carefully detailed and explicit provisions for all the particular cases and circumstances for which it was thought necessary to provide.

The series of sections (16 to 23 inclusive) dealing with "prescriptions and claims of or for any modus decimandi, or of or to any exemption from or discharge of tithes" (referred to in Sir Edward Sullivan's judgment), are preceded by this preamble (in sect. 16) :—"And forasmuch as the rent-charges made payable by this Act are charged upon the lands heretofore subject to the payment of compositions for tithes, it is expedient to make provisions for the more cheap and convenient determination of the liability to such compositions." If any lands were exempt or discharged from tithes, there could not, as to those lands, be any composition, and therefore there was to be no rent-charge; if there was a valid modus decimandi, that would be the measure of the composition, and therefore of the rent-charge also. These provisions were preliminary and antecedent to the process of commutation; they had no application to any rent-charge once created by sect. 7.

Sir Edward Sullivan relied also upon sect. 24, which provides that the rent-charges shall be payable "to and amongst the several persons who would have been, if this Act had not been made, entitled to compositions for tithes arising out of the several lands charged with such rent-charges respectively, and in the same proportions, and vested in such persons, for the like estates or interests, and subject to the like trusts, uses, charges, payments,

rents, liens, and encumbrances, of what nature or kind soever." The purpose of that section is obviously (in my judgment) to transfer to the new rent-charge all titles, interests and charges which had been applicable to the old, but not by any means to deal with the remedies by which the new right, given in substitution for the old, was to be enforced (this being expressly done by sects. 27 to 31 inclusive), nor to provide how or by what law that new right, after it had once arisen, might be lost or barred. Statutes of Limitation, whether including or not a particular subject, do not enter either positively or negatively into the constitution or quality of the right or title to that subject. In the case of the *Ecclesiastical Commissioners* v. *Rowe* (1) this House found, in a particular section of the Act of Parliament which it had then to construe, express words, which it held to transfer to the Commissioners, for the purpose of obtaining possession of the lands vested in them by that statute, (and for that purpose only), all the powers and remedies which at the moment of the transfer belonged to the prior ecclesiastical corporation. But even there it was held that the object of the section "was to effectuate the transfer by establishing a legal continuity between the rights, powers, and remedies of the Commissioners and those of the former corporation sole; not to regulate the manner in which the Commissioners should enjoy them after they had obtained the full benefit of the transfer."

There must, I think, be some error in the report of that part of Sir Edward Sullivan's judgment (2) in which he is represented as saying, that the question before him was "Whether an incumbent, who, by neglect or otherwise, has failed to obtain payment of the tithe rent-charge for twenty-five years, would have been barred from ever recovering it"; and adding "that is a startling proposition, for, if so, the nonpayment would have affected his successors." If the tithe rent-charge had continued to be vested in a spiritual corporation sole, the case (assuming it to be governed by the Statute of Limitations at all) would have been within the 29th section of that statute; which fixed, not twenty or twenty-five years, but the whole term of two successive incumbencies and

(1) 5 App. Cas. 745. (2) Ir. L. R. 11 Ch. D. 435.

H. L. (I.) 1884 IRISH LAND COMMISSION v. GRANT. Earl of Selborne, L.C.

part of a third, or sixty years, (whichever might be the longest), as the time within which an entry or distress might be made, or an action brought to recover "any land or rent," by a spiritual or eleemosynary corporation sole.

It may, no doubt, seem anomalous, that the present appellants, as statutory transferees of this rent-charge, should have become, ipso facto, and at the very moment of the transfer, liable to have the twenty years' period of limitation reckoned against them under the second section, from "the time at which the right to make an entry or distress, or bring an action, first accrued," not to themselves, but "to the person" (i.e. the former spiritual corporation sole) "through whom they claim;" that person having been, as long as his title continued, within the 29th section, and not within the 2nd. But the words of the 2nd section seem to me to be plain; the twenty years are not to be reckoned from the time when the right to enter or distrain, or to bring an action, "shall have first accrued to the person making or bringing the same," except in one case, viz., "if such right shall not have accrued to any person through whom he claims;" and the word "person" extends to all corporations without any exception of those which are spiritual or sole. The 29th section clearly does not apply to the appellants: either they are outside of the statute altogether, or the 2nd section applies to them. There is no express provision here, as there was in the Act (3 & 4 Vict. c. 113) which this House had to interpret in *Ecclesiastical Commissioners* v. *Rowe* (1), to meet this difficulty.

My conclusion is that, unless this rent-charge ought (as Palles C.B. thought) to be regarded as a "composition" within the meaning of that word as used in sect. 1 of the Statute of Limitations, it cannot be taken out of the purview of the 2nd section on any of the grounds relied upon by Sir Edward Sullivan. The fact that it is a statutory substitute for tithes does not make it less a "rent" than any rent-charge created by deed; the legislature clearly intended to create a rent-charge in the proper and legal sense of that word, and has clearly done so.

Is it then a "composition"? I cannot think so, merely because

(1) 5 App. Cas. 745.

it is a statutory substitute for a former right of a different legal nature, which was so denominated; nor do I think that any aid towards that conclusion can properly be derived from the natural meaning of the word itself. To "compound" a debt or claim, is to accept, in satisfaction of it, something less than, or something different from, that which may be claimed as of right,—generally by way of compromise or agreement. In that sense, a fixed statutory rent-charge, created by way of commutation or extinguishment of tithes (or of a composition for tithes), is not itself a composition.

I have no doubt, both from the known technical use of the word before 1833, and from its association with "moduses" in the exception from definition of "rent" contained in the Statute of Limitations, that what the legislature in the statute had directly in view were compositions real; but as the statute extends to Ireland, and as the Act 4 Geo. 4 c. 99 had established in Ireland temporary "compositions for tithes" (eo nomine), which, under 2 & 3 Wm. 4 c. 119 had been replaced by fixed and permanent "compositions in lieu of tithes" (also eo nomine), I am disposed so far to accept the appellants' argument, as to hold that the exception in the Statute of Limitations extended to that class of compositions, when belonging to a spiritual or eleemosynary corporation sole.

But all those compositions ceased in 1838. The Irish Tithe Commutation Act (1 & 2 Vict. c. 109) distinguishes throughout between those compositions and the new rent-charge which (by sect. 7) it created. That Act begins with a recital that "it is expedient to abolish compositions for tithes in Ireland, and in lieu thereof to substitute rent-charges," &c. The first section enacts that "the right of all persons in and to all tithes or compositions for tithes heretofore accrued or at any time hereafter to accrue due in Ireland, shall wholly cease and determine." Under this statute it seems to me to be impossible to hold that the new rent-charge is either in name or in nature a "composition" within the meaning of sect. 1 of the Statute of Limitations. I cannot therefore accede to the view taken in the Court of Appeal by Palles C.B. and my opinion is that the judgment of the majority of the Court was right, and that the present appeal ought to be dismissed with costs.

H. L. (I.) 1884 IRISH LAND COMMISSION v. GRANT.

LORD BLACKBURN:—

My Lords, at the conclusion of the argument I was strongly inclined to the opinion now expressed by the Lord Chancellor. I have since read in print and considered the opinion just delivered by him. I quite agree both in the conclusion and in the reasons given, to which I have nothing to add.

LORD FITZGERALD:—

My Lords, I can add nothing to the reasons so carefully expressed by the Lord Chancellor for the judgment of your Lordships' House.

I confess that at the close of the argument I desired time to consider the judgment of the Master of the Rolls in the primary Court, and of the reasoning of the Chief Baron in the Court of Appeal, and also the able arguments addressed to your Lordships in support of the appellants' case. After the most careful consideration I have satisfied myself that the judgment of the Master of the Rolls cannot be sustained, and that the decision of the Court of Appeal is correct.

I concur in the judgment delivered by the Lord Chancellor.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 20th November 1884.

Solicitors for appellants: *Nicholl, Manisty, & Co. for J. H. Franks, Dublin.*

Solicitors for respondents: *Cruse & Clay for M. C. Moynagh, Dublin.*

[HOUSE OF LORDS.]

MARY WALTON . . . . . APPELLANT;

AND

HENRY EDGE AND OTHERS . . . . . RESPONDENTS.

H. L. (E.)
1884
Nov. 28.

Building Society—Withdrawal of Members—Construction of Rule "provided the funds permit"—Winding-up—Priorities in Winding-up.

The rules of a benefit building society allowed any investing member to withdraw "provided the funds permit," upon giving notice; and declared that "no further liabilities shall be incurred by the society till such member has been repaid." The society was ordered to be wound up and the assets were insufficient to pay everybody:—

Held, affirming the decision of the Court of Appeal, that those investing members who had given notice of withdrawal and whose notices had expired before the winding-up began, were entitled to be paid out of the assets (after the outside creditors) in priority to those members who had not given notice of withdrawal, notwithstanding the fact that between the giving of the notices and the winding-up there never were any funds for payment.

APPEAL from an order of the Court of Appeal, reported as *In re Blackburn and District Benefit Building Society* (1).

The agreed statement of facts is set out at length in the report of the decision below (1).

For the present report the following statement will suffice:—

By the rules of the Blackburn and District Benefit Building Society (established under 6 & 7 Will. 4 c. 32) the value of each share was £10. Rule 2 regulated the interest upon subscriptions. Rule 3 was as follows: "Any member of this society shall be allowed to withdraw (provided the funds permit) sums not exceeding £10 by giving seven days' notice, and sums exceeding £10 by giving one month's notice, according to the printed form in the schedule annexed. No further liabiiities shall be incurred by the society till such member has been repaid."

A petition to wind up was presented in the Chancery Court of the county palatine of Lancaster on the 23rd of July 1881 and an order to wind up made on the 25th of October 1881.

(1) 24 Ch. D. 421.

H. L. (E.)
1884
WALTON
v.
EDGE.

The only question raised on this appeal was whether those investing members who had given notice to withdraw their investments and whose notices had expired before the beginning of the winding-up were entitled to be paid (after the outside creditors) in priority to those investing members who had given no notice, the assets being insufficient to pay all in full. The Vice-Chancellor of the County Palatine and the Court of Appeal (Brett M.R. Cotton and Bowen L.JJ.) held that they were (1). The appellant represented the class of investing members who had given no notice of withdrawal.

Nov. 27, 28. *Ince* Q.C. and *H. B. Buckley* (*Ralph Neville* with them) for the appellant:—

The question is whether investing members who had given notice of withdrawal are entitled to be paid under a winding-up order in priority to other members who had given no notice. The appellant contends that they are not. The further question which was raised before the Vice-Chancellor, whether certain informal notices were valid, was given up before the Court of Appeal, and will not be raised in this appeal. The appellant contends that the claim of a member who has given notice is not a debt, contingent or otherwise. Until he gets his money he is a member; and if a winding-up order is made he continues a member. He could not sue the society for his money before the winding-up, nor after. The effect of a winding-up order is to give notice of withdrawal for all members; because on a winding-up every member is entitled to be paid in full provided the funds permit. "Provided the funds permit" means provided there is ready money and as long as the society is a going concern. If there is no ready money when the winding-up begins the funds never do permit payment; from that moment no notice of withdrawal can be given, nor any previous notice acted upon. The notice does not become effective till the day fixed by it for payment, and if that day should fall after the winding-up order the notice never becomes effective. The agreed statement of facts does not say whether there ever were any funds between the giving of the notices and the winding-up order. But it is known

(1) 24 Ch. D. 421.

as a fact that though the bankers allowed overdrafts, unlawfully and without any power in the rules, there never was a balance to the credit of the society between those dates. This appears incidentally from the case of *Cunliffe Brooks* v. *Blackburn and District Benefit Building Society*, a decision upon the rules of this very society (1). The decision of the Court of Appeal in that case is an argument in favour of the appellant's contention; that contention follows as a necessary consequence from the decision that payments to withdrawing members must be excluded in taking the accounts between the society and its bankers. The decision of the House of Lords leaves the decision of the Court of Appeal untouched on that point. If the respondents' contention is sound the moment a building society is suspected to be in difficulties there will be a rush of investing members to give notice and secure priority. *In re Mutual Society* (2), per Jessel M.R., is an authority that there is no priority in such cases; see also *Brownlie* v. *Russell* (3), per Lord Selborne. A priority such as the appellant claims must be distinctly provided for in the rules: *In re Norwich Building Society* (4). The rules were clear and express as to priorities in the case of *In re Queen's Building Society* (5).

E. Macnaghten Q.C. and *T. Snow*, for the official liquidators, respondents;

Horace Davey Q.C. and *C. A. Russell*, for those members who had given good notices of withdrawal, respondents; and

J. Rigby Q.C. and *W. D. Rotch*, for those members who had given informal notices of withdrawal, respondents; were not heard.

EARL OF SELBORNE L.C.:—

My Lords, this appeal relates to the rights of withdrawing members of the Blackburn Building Society, whose members were at liberty to make upon this subject any contract inter se which they pleased. The real question is as to the construction

(1) 22 Ch. D. 61; 9 App. Cas. 857.
(2) 24 Ch. D. 425, n.
(3) 8 App. Cas. 235, 254.
(4) 45 L. J. (Ch.) 785.
(5) Law Rep. 6 Ch. App. 819.

H. L. (E). 1884 WALTON v. EDGE. Earl of Selborne, L.C.

of the contract which they have made, and that entirely depends upon the language and the effect of the 3rd rule; it does not appear to me that any other rule has really any material bearing upon the question.

That rule is, "Any member of this society shall be allowed to withdraw (provided the funds permit) sums not exceeding £10 by giving seven days' notice, and sums exceeding £10 by giving one month's notice, according to the printed form in the schedule annexed." I will say in reference to that, that there is nothing in the language of the form which appears to me to add in any material way to the language of the rule or to assist materially in placing a construction upon it. "No further liabilities shall be incurred by the society till such member has been repaid." The question is, what right accrued to the withdrawing member who gave notice not only before there was any winding-up, but when he had no information that any winding-up was going to take place, when nothing special is alleged to affect him with notice that the society was not to continue as a going concern, and when, even if an objection could have been made by the directors to his notice to withdraw, none was actually made; the question is what right accrued to such withdrawing member on the expiration of the notice required by that rule. Not a right to immediate payment, that is clear, unless the funds then available enabled the directors to make that payment. But does it follow that, because the words "provided the funds permit" postponed a payment which the then state of the funds would not permit, therefore the expiry of the notice to withdraw was to be of no effect? It is not contended that it was to be of no effect, and it appears to me that the rule must be construed without any reference whatever to a contingency not contemplated or expressly provided for, namely, a subsequent winding-up of the society. The question what effect the occurrence of that contingency had upon the rights of the parties must depend, first of all, upon the contract itself construed without reference to the occurrence of that contingency; and secondly, upon the law which has been laid down as to the effect of a winding-up order.

Now I put aside entirely the consideration of a subsequent winding-up before actual payment, and solely inquire what right

accrued to the withdrawing member on the expiry of his notice. It is said that the words "provided the funds permit" qualify the right to withdraw, so that there is to be no right of withdrawal, there is to be in effect no withdrawal, until the funds are in such a state as to enable payments to be made. But to consider whether that can be the meaning of the word "provided," we must look at the entire context, and first of all inquire whether such a construction is consistent with the principle of a certain definite term of notice, in one case seven days and in another case a month. Surely that means primâ facie, that some right accrues to the withdrawing member at the expiry of that notice which he had not before. And in aid of that construction there are the very important words which follow: "No further liabilities shall be incurred by the society till such member has been repaid." It is admitted, I think, that that means, after the expiry of the notice. If there are then funds he has an immediate and absolute right to receive payment; if there are not funds he has acquired the right, when the funds permit, to receive payment. He has done all which lies in him and which is in his power to withdraw; and a stop, as between him and the society, is put upon the power of the society to contract further liabilities until he has actually got payment; so that nothing new which the society can do in favour either of any member of the society or of any outside creditor can, consistently with his contract and as between him and the society, intercept his right to payment out of funds when they come in. I confess that it would appear to me a very strange thing if it could be made to be consistent with that contract that the non-withdrawing members should put forward any claims of theirs occurring after the end of the notice as an impediment to his right to be paid out of any moneys which might come in. Nobody, I think, would contend that that could be so, irrespective of the winding-up.

Then what is there in this contract to say that, if the funds do permit the payment to be made, though it was not possible before the winding-up, yet if it becomes possible after that time, it shall not be done? Certainly there is nothing on the face of the contract to that effect; there is nothing to say that in any case when there are funds with or without winding-up, the non-withdrawing

H. L. (E.) 1884 WALTON v. EDGE. Earl of Selborne, L.C.

members are to come into competition with the right thus given to the withdrawing member. Is there anything to that effect in the Act under which building societies are liable to be wound up? Nothing whatever. The particular terms of that Act have not been referred to, but they are familiar to your Lordships. It provides that when there is a winding-up the transactions of the society are to stop; there can be no new contracts entered into; there can be no change of the position in which the parties stand at that time; no new notice of withdrawal can be given or anything of that character; and an official liquidator is appointed, who is to collect the assets of the society and to administer them in a due course of administration, paying creditors first and the costs of the winding-up, and then if there is a surplus that surplus is to be applied according to the rights of the members inter se. If the members had contracted with each other before the winding-up that in an event which had happened before the winding-up a particular member should have a right to be paid off his share or a sum which he desired to withdraw, as soon as the funds should permit, then the moment the funds of the society are cleared from claims prior to his right that right must take effect in a due course of administration under the winding-up, just as it would have done before. In adjusting the rights of the members inter se, without going into any technical question as to the use of the word "creditor," those members are to be preferred who under the contract have a right to a preferable payment out of the free assets, the free funds, when they exist.

Then, what is the answer which is made to that? The only answer which I have heard made, and which I have been able to follow at all, has been that the words, "provided the funds permit," mean the moneys which come in and are available to meet the liabilities of the society from time to time as long as it is a going concern. If that had been expressed, of course a line would have been drawn, as to this part of the contract, at the time when it ceased to be a going concern; but it is not expressed, and why in a contract inter se to give one member a preferable right to another, assuming them to be still, in one sense, all members, you should imply a line of that kind when the words do not express it and there is nothing in the nature of the

contract to suggest that justice requires such a construction, I cannot understand. No doubt, if there were creditors having a right in priority, what have been called outside creditors—the funds would not permit this payment to be made until they had been satisfied; but they have been satisfied, and I cannot find in the principle or in the enactments of the Winding-up Act, or in the terms of this contract, anything to suggest that the words "the funds" here mean the funds which shall be realised and become available, in the event of a winding-up, before that event occurs.

I think it unnecessary to say more about the matter, excepting that this is perfectly consistent with the principles which would be applicable in the case of a partnership. In the case of a partnership, no one partner can claim against the partnership assets in competition with the creditors of all; but the moment that all those creditors are paid one partner may have a preferable right to the others, and be a quasi-creditor of the concern inter se, if there is anything in the partnership contract to justify such a preference. The sole question is whether that is so or not; and why that right should be taken away by the event of a winding-up occurring is to me a thing which it is impossible to understand.

Now, with regard to the authorities, there are only three which seem to me to be at all in point; and of those, with regard to the one which is, as far as it goes, adverse to the case of the appellant, namely, the case of the *Norwich Society* (1), some differences have been pointed out which are not immaterial to the line of argument which has been addressed to your Lordships. As I read that case there is this, which is really the principal difference in my view, that there it was not contemplated that it should be at the option of any member having a number of shares in the society amounting in the whole to a certain sum, to withdraw a part of that sum or a part of those shares while continuing a member in respect of the rest. But here that option appears to be given—he may withdraw any sum he pleases, remaining a member in respect of other sums or other shares. I agree that there is that difference, that a total withdrawal from the society was contemplated in the *Norwich Case* (1), while here it is at

(1) 45 L. J. (Ch.) 785.

H. L. (E.) 1884 WALTON v. EDGE. Earl of Selborne, L.C.

least not manifest that it was contemplated. I think it was not necessary. Some cases have been pointed out where that did not happen. That is a distinction not without importance, but I think it is not of sufficient importance to prevent the case, as far as it goes, bearing against the argument for the appellant, because that case at least shews that there is nothing inconsistent, either with the nature of the contract contained in rules of this description, or with the effect in point of law of a winding-up order, in the proposition that a withdrawing member, if entitled under the rule, may stand as a quasi-creditor against the funds, when all other creditors have been paid. I do not think that the distinction turning upon the grant of a certificate by the directors, or upon a subsequent express allowance of 3 per cent. interest, is very material. About interest there may be a question, but that is not necessary for the decision. Whether it would be due or not, still if the construction of the rule is what I take it to be, the result would, I think, be the same.

The case of the *Mutual Society* (1), in my judgment, as in the judgment of all the judges in the Court of Appeal, depended upon a particular rule which they construed, which I construe, and which I think the late Sir George Jessel construed, as providing for the constitution of a special and definite fund out of which alone withdrawing members were to be paid, in a manner which was inapplicable to the state of things existing after the winding-up. Therefore the case of the *Mutual Society* (1) has no application.

And with regard to the *Blackburn Building Society* v. *Cunliffe Brooks & Co.* (2), that case stood thus: The question was between bankers who held deeds of the society against which advances had been made and the official liquidator, the official liquidator not representing one class of members alone nor the members alone, but representing all the contributories and also the creditors; and unless the bankers had a right to hold as against all creditors and all contributories they failed in their case. Now payments which the bankers might have made to withdrawing members, if they were made out of money lent and advanced by the bankers and not then belonging to the society and to the

(1) 24 Ch. D. 425, n. (2) 22 Ch. D. 61; 9 App. Cas. 857.

credit of the society, could not be payments made under this rule in due course, because those were non-existing funds and only supplied by means of a loan which was not itself legitimate. Therefore in a case so arising all such payments were primâ facie in a different category from those which might have been made in discharge of actual debts and liabilities of the society presently exigible, in respect of which the Court thought that the bankers were entitled to stand in the same position as if they had been, by assignment or otherwise, subrogated to the rights of the creditors whom their money paid. That could not be the situation of payments made by the bankers to withdrawing members, the time for whose payments had not yet arisen because the society had no money to pay them. Any ulterior question as to whether the bankers might or might not have a right to stand in the place of those withdrawing members if, in the course of the administration under the winding-up order, there should turn out to be a surplus to which those withdrawing members might be entitled, did not arise, and I think could not have arisen as the case then stood; and it is not necessary for me to express any opinion as to whether the principle, on which the bankers were allowed to stand in the place of actual creditors entitled to immediate payment and paid with their money, would have been applicable to such a claim to stand in the place of withdrawing members against an eventual surplus. It is enough to say that nothing was decided in the Court of Appeal, any more than in this House, which had any bearing upon any such question.

I move your Lordships to affirm the judgment of the Court below.

LORD BLACKBURN:—

My Lords, I also am of opinion that this order appealed against should be affirmed. I think the whole question really turns upon the true construction of the 3rd rule, and I think that that is a question entirely of the construction of the rules. I quite agree also with what seems to have been said by the late Sir George Jessel, though I do not think it was always properly understood, that in construing the rules and seeing what it is that they mean we are to take into view what the parties were talking about

H. L. (E.) 1884 WALTON v. EDGE. Lord Blackburn.

and see what were the whole objects of the society, and, looking at the society as a going concern, as it is called, see what if it were carried on as it would be expected to be carried on, the parties must be considered to have intended. Now, when one does that I have no difficulty myself in construing this rule. The object of the society, it is to be remembered, was to raise money partly from investors who deposited money, receiving for it interest at 5 per cent. and having certain advantages which come afterwards, and partly from members who on becoming members were to get advances made to them out of the funds of the society, which they were to secure by mortgage and to repay generally speaking by instalments that were weekly, so that there would be a periodical fund constituted. There would therefore be funds accumulating in that way. The society may seek to make further advances: and all this money which they receive is subject to be appropriated to paying the absolute liabilities which have been already incurred by the society.

Now that being so, it is obvious that when an investing member, one who had put in his money to invest it, wished to call it back, nothing would be more reasonable than for the society to say, "Of course you may have it called back upon giving proper notice, but remember this, that as we have during this time been incurring liabilities from time to time you shall not call it in and call upon us to pay you off and thereby leave those liabilities unpaid; our funds as they come into our hands must be applied by us first in paying off the debts which are already existing, as against you, before you are repaid your money." I think it would also be very reasonable to say, "You shall not be entitled to require us to sell any of those mortgages which are in our possession." A mortgage given by a member whose advances were secured by his mortgage could not be enforced so long as he continued to fulfil the requirement—that is to say, such a mortgage could not be treated as a forfeited mortgage and realised in that way, but I suppose it might have been sold; and I think it is probable that they intended to say, "You shall not have the power of compelling us to sell such a mortgage—it may go on; but subject to this you shall, upon giving us a month's notice, have the right to withdraw.

Now if that was the object which the society had in their minds, have they not expressed it in rule 3? I have looked at it in a vain attempt to see that they have not so expressed it. It seems to me that taking such a society and such an object of the society the words there used do really mean this, that the investing member has no right to be repaid so long as there are prior liabilities which remain unpaid, and that he has no right in order to be repaid to require the society to sell off or part with the mortgages which advanced members have made to them, but that subject to those two limitations he has a right to be repaid. Why should he not? What is there against such a right? It was argued that he could not have it because there was something (I did not exactly understand what) in the nature of the transaction between the members of the society entering into a bargain of this sort which made it impossible or illegal or incompetent for it to be a binding bargain between them. I did not understand it; but it is really not a thing that there can be the least doubt about. If the real intention of the parties was, as it appears to me to have been, sufficiently expressed that the money was to be repaid at a particular time, then it is to be repaid. Now it was not to be repaid at once, as I have already pointed out; but what is there to prevent there being a contract that the society were to repay the money although the time of payment was deferred? I will not call these withdrawing members "creditors," for I will not beg the question. I will not speak of a "creditor" and a "debt," because, as has been truly enough said, they are not strictly speaking creditors, and it is not strictly speaking perhaps a debt; but I do say, what is there to prevent this agreement on the part of the society to pay the money being an agreement to pay the money absolutely, although the time when the payment is to be made may be deferred, and because it may be said of it Debitum in præsenti, solvendum in futuro? That is what one would say of a debt. Why should not this be treated in the same way? I can see no reason why it should not. If that be so I do not think the winding-up makes any difference. The winding-up no doubt stops all things which are coming on from coming to maturity—it stops them in that sense, but when a right has been acquired in præsenti, although it is solvendum in futuro, I see no reason why it should not be enforced in a winding-up.

H. L. (E.) 1884 WALTON v. EDGE. Lord Blackburn.

I think that that really is the whole case. I think that the late Master of the Rolls in the case of *In re Mutual Society* (1) did determine upon the special rules of the society in that case, that it was not such a matter as I have described, an absolute promise to pay, but only a promise to pay out of a particular fund, which particular fund was destroyed at the time; and I think that no one who reads the rule which is quoted at the bottom of the page of the report can fail to see that it was so, and that Sir George Jessel was perfectly right in what he decided.

I do not think it necessary to make any remarks upon the other cases which have been cited, because the explanation which has been given of them by the Lord Chancellor perfectly meets my view.

LORD WATSON: :—

My Lords, I concur.

EARL OF SELBORNE L.C. :—

I observe that in the Court below the whole costs were directed to be paid by the official liquidators out of the estate; and it is said that this appeal is brought as a representative appeal and with the approval of the Court. I should therefore advise your Lordships to deal with the costs in the same manner as they were dealt with in the Court below.

Order appealed from affirmed, and appeal dismissed; the costs of all parties in respect of the appeal, when taxed, to be paid by the official liquidators out of the assets of the society in the same manner as was ordered in the Court below.

Lords' Journals 28th Nov. 1884.

Solicitors for appellant: *Hare & Co. for T. & R. C. Radcliffe, Blackburn.*

Solicitors for the various respondents: *T. G. Field for W. Danger, Liverpool; Chester & Co. for H. M. Richardson, Bolton-le-Moors; Ridsdale & Son for Robinson & Sons, Blackburn.*

(1) 24 Ch. D. 425, n.

[HOUSE OF LORDS.]

H. L. (E.) 1884 Dec. 4.

ISABELLA BERKLEY (IN FORMÂ PAUPERIS) APPELLANT;

AND

WILLIAM THOMPSON AND OTHERS JUSTICES OF THE PEACE FOR THE BOROUGH OF SUNDERLAND AND HENRY DUNCAN . . . . RESPONDENTS.

Bastardy—Service of Summons in Scotland—Jurisdiction of Justices where Putative Father resident in Scotland—Bastardy Laws Amendment Act 1872 (35 & 36 *Vict. c.* 65)—*Summary Jurisdiction (Process) Act* 1881 (44 & 45 *Vict. c.* 24) *ss.* 4, 6.

The Summary Jurisdiction (Process) Act 1881 (44 & 45 Vict. c. 24) does not enable a bastardy summons to be issued by justices in England and served in Scotland upon the putative father domiciled and resident in Scotland; and if a summons is so served and the putative father does not appear before the justices they have no jurisdiction to make a bastardy order against him.

So *held* affirming the decision of the Court of Appeal.

APPEAL from an order of the Court of Appeal reported as *Reg.* v. *Thompson* (1).

The appellant who resided in Sunderland having on the 3rd of August 1883 lodged an information and application before the justices for the borough of Sunderland for an affiliation summons in respect of a child born in August 1882, a summons was issued against the respondent Duncan of Greenock, the alleged putative father. This summons was served upon Duncan at Greenock by a police officer of Greenock. At the hearing of the summons before the justices for the borough of Sunderland on the 9th of October 1883 Duncan did not appear, but it was objected by his solicitor on his behalf that the justices had no jurisdiction, on the ground that he was domiciled and resident in Scotland. The justices took that view and declined to adjudicate.

A rule having been obtained calling upon the respondents to shew cause why the justices should not proceed to hear and determine the matter, the Queen's Bench Division (Day and Smith JJ.) after argument made an order discharging the rule.

(1) 12 Q. B. D. 261.

H. L. (E.) 1884 BERKLEY v. THOMPSON.

This order was affirmed by the Court of Appeal (Brett M.R. and Bowen L.J.) (1).

It was not stated in the case or affidavits whether the summons had been "indorsed by a Court of summary jurisdiction in Scotland." The original summons was shewn to their Lordships on the hearing of the present appeal; it bore no indorsement.

Gainsford Bruce Q.C. and *Hans Hamilton* for the appellant:—

The question is whether jurisdiction is given by the Summary Jurisdiction Process Act 1881 (44 & 45 Vict. c. 24). The indorsement of the summons is not alleged, but it seems to have been assumed throughout in the Court below. Indorsement is no doubt primâ facie necessary to give jurisdiction under s. 4.

[EARL OF SELBORNE L.C. :—So far as appears from the summons it seems not to have been indorsed in Scotland: but it would not be satisfactory to determine the appeal upon that ground alone.]

Treating the summons then as if it had been properly indorsed by a Court of Summary Jurisdiction in Scotland, and duly served within s. 4 of the Summary Jurisdiction (Process) Act 1881, the question is whether the justices had jurisdiction to make the order asked for. A similar question arose under 7 & 8 Vict. c. 101 ss. 2, 3, in *Reg.* v. *Lightfoot* (2). There no doubt the majority of the Court held that the justices had no jurisdiction, but Lord Campbell was of a different opinion, and his reasoning is applicable here and should be adopted in the present case. The service of process in Scotland is provided for by 11 & 12 Vict. c. 42 s. 14, which is referred to in the Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43) s. 3.

By the Bastardy Laws Amendment Act 1872 (35 & 36 Vict. c. 65) general jurisdiction over the matter is given to justices. By s. 51 of the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49) the Summary Jurisdiction Acts are to be applied to any future Act by which any sum of money is directed or authorized to be recovered before a Court of summary jurisdiction, and s. 54 expressly applies the Act to bastardy orders. The Summary

(1) 12 Q. B. D. 261. (2) 6 E. & B. 822; 25 L. J. (M.C.) 115.

Jurisdiction Acts are therefore applicable to the Summary Jurisdiction Act 1881 (44 & 45 Vict. c. 24), which by s. 6 gives jurisdiction in the present case. The respondent Duncan was "a person within the jurisdiction of the Court" within the meaning of that section, for that means any person brought within the jurisdiction by the service of process under s. 4. Then s. 4 enables the summons to be served and executed in Scotland, and the jurisdiction is thus complete; see also ss. 1 and 8.

Poland for the respondent Duncan was not heard.

No counsel appeared for the justices, respondents.

EARL OF SELBORNE L.C.:—

My Lords, the learned counsel who represent the pauper appellant at your Lordships' Bar have done their duty with zeal and with ability, but I do not think they have succeeded in creating in your Lordships' minds any doubt whatever as to the correctness of the order under appeal. To me it seems an extremely clear case.

I will observe two things at the outset. First of all, though a summary jurisdiction under the Bastardy Acts is given to justices, yet the bastardy law is one thing and the Summary Jurisdiction Acts are another; and this being a case of bastardy we shall have to consider the bastardy law in the first place, and then, if necessary, the application to that law of the Summary Jurisdiction Acts afterwards. Now the bastardy laws beyond all question did not, before the year 1881, give to the justices any jurisdiction in a case of this kind where the person summoned was a Scotchman, domiciled, and not only ordinarily but actually resident, in Scotland. Those Bastardy Acts were English Acts, they did not extend to Scotland, and did not contain any provisions whatever contemplating their execution in Scotland; and until the Act of 1881 I have not heard from the learned counsel any reference to any one of the Summary Jurisdiction Acts which gave a jurisdiction in bastardy cases except to execute those bastardy laws which did not, as I have said, extend to Scotland.

In the year 1856 the question arose before the Court of Queen's

H. L. (E.) 1884 BERKLEY v. THOMPSON. Earl of Selborne, L.C.

Bench in the case of *Reg.* v. *Lightfoot* (1) on the Bastardy Act of 1844, which like the later Act of 1872 contained a provision that a woman who was the mother or expected to be the mother of a bastard child might make application to the justices having jurisdiction in the place where she resided for an affiliation order. And that was the condition under all the Acts prior to 1881, of the woman's remedy; she was to apply to the justices at the place where she resided, and she was to apply under Acts which had no operation whatever in Scotland and which contained no provision for their execution in Scotland. Under those circumstances the Court of Queen's Bench by three judges against one (no doubt the dissentient judge, Lord Campbell, was a very eminent judge) held that service of the process of the magistrates upon such an application by the woman meant service at all events within the jurisdiction of the Courts and magistrates who were subject to that English legislation. Lord Campbell appeared to see his way to overcome that difficulty by putting what, I am bound to say, seems to me a very unusual and non-natural interpretation upon the clause of the Act which said, not in the common negative words that it should not apply to Scotland or Ireland, but that it should "extend only to England and Wales." However that may be, the Court decided that "service" meant service within the English jurisdiction. I do not of course mean within the jurisdiction of the particular magistrates, but within the jurisdiction of the law of that country to which alone the Act of Parliament applied.

Whatever opinion might have been entertained between the year 1856 and the year 1872 as to the possibility of a Court of higher authority than the Court of Queen's Bench reviewing that precedent and agreeing with Lord Campbell, the legislature in 1872 dealt with the case by an Amendment Act, amending the bastardy laws in a manner which plainly proceeded upon the decision of the Court of Queen's Bench, and assumed the correctness of that decision; because the 3rd section of that Act provided that a woman under the circumstances which brought the Bastardy Acts into operation might take her proceeding in the place where she resided, within certain periods of time;

(1) 6 E. & B. 822; 25 L. J. (M.C.) 115.

the first was before the birth of the child or within twelve months afterwards: the next was at any later time on proof that the alleged father had within twelve months after the birth paid money for the maintenance of the child; and the third was "or at any time within the twelve months next after the return to England of the man alleged to be the father of such child upon proof that he ceased to reside in England within the twelve months next after the birth of such child." It is impossible to read that provision without seeing that this legislation proceeds upon the footing that the presence of the putative father in England is necessary for the jurisdiction to attach; and I must say, both with respect to the decision in *Reg.* v. *Lightfoot* (1) and with respect to that legislation, that they proceeded upon general principles; because the general principle of law is, "Actor sequitur forum Rei;" not only must there be a cause of action of which the tribunal can take cognizance, but there must be a defendant subject to the jurisdiction of that tribunal; and a person resident abroad, still more, ordinarily resident and domiciled abroad, and not brought by any special statute or legislation within the jurisdiction, is primâ facie not subject to the process of a foreign Court—he must be found within the jurisdiction to be bound by it. However, one need not here rest upon general principles, because there is the decision, and there is the statute of 1872.

The only other statute which has been referred to as at all material before 1881 is that of 1879; and it appears to me that in the statute of 1879 a distinction between the ordinary summary jurisdiction of magistrates and the special summary jurisdiction in bastardy cases is recognized. Two sections of that Act were referred to, namely, the 51st and the 54th. The 51st section is irrelevant. If it were supposed that those who framed it were particularly thinking of the bastardy law they were thinking of it to exclude it, because the regulations contained in that section are expressly confined to the operation of future Acts. Now the Bastardy Acts were then existing. That section, therefore, cannot have any application whatever to the matter.

The 54th section shews that in order to bring bastardy cases within the purview of the Act, the legislature thought fit to

(1) 6 E. & B. 822; 25 L. J. (M.C.) 115.

BIBL. LONDIN UNIV.

H. L. (E.) 1884 BERKLEY v. THOMPSON. Earl of Selborne, L.C.

make special provision; and it made that provision not by applying the Act in all points and for all purposes, as to matters of process and otherwise, to bastardy cases, but by applying the Act in a limited and special way. "This Act shall apply to the levying of sums adjudged to be paid by an order in any matter of bastardy, or by an order which is enforceable as an order of affiliation, and to the imprisonment of a defendant for non-payment of such sums;" that is, the 21st section which deals with those matters shall be capable of application to steps which may be taken after an order in bastardy has been made, and not to the exercise of the jurisdiction to make that order. Then it goes on to add, that it shall also "apply to the proof of the service of any summons, notice, process, or document in any matter of bastardy and of any handwriting or seal in any such matter;" again a limited, a very limited, application of the Act to these cases.

Those being the only sections in the Summary Jurisdiction Act of 1879 which have been referred to, we come to the statute of 1881; upon which it has been argued, first, that the 4th section gives a general jurisdiction to serve a summons and other process in English affiliation cases in Scotland without any limit whatever; and, secondly, that the 6th section of the Act, which deals with this particular matter, is to be read as cumulative and not as containing the whole provisions which the legislature at that time thought fit to make by way of alteration of the previous bastardy laws. Both arguments seem to me to be thoroughly unsound. In the first place the 4th section is introduced and governed by these words: "Subject to the provisions of this Act any process issued under the Summary Jurisdiction Acts may, if issued by a court of summary jurisdiction in England and indorsed by a court of summary jurisdiction in Scotland, be served and executed in the manner there mentioned."

The learned counsel have contended that cases and persons which before were not within the jurisdiction of the English justices are brought within the jurisdiction of those justices by that section. To me it appears, quite clearly, that the section proceeds upon the assumption of jurisdiction under the Summary Jurisdiction Acts. How can the process be issued under the

Summary Jurisdiction Acts if the Summary Jurisdiction Acts give no power to issue such process? This point is not peculiar to bastardy cases; the argument goes to the extent, that any process whatever which a court of summary jurisdiction can be induced to issue, though in a case manifestly altogether beyond its jurisdiction, and as to which the Summary Jurisdiction Acts give it no jurisdiction, is nevertheless to be served and executed in the manner provided for in Scotland. To me the natural meaning of the words, "process issued under the Summary Jurisdiction Acts," is process issued under the jurisdiction given by those Acts, and in the manner which those Acts authorize and require. It is begging the whole question to say that those Acts give jurisdiction to issue a summons in this case. On the contrary, all the enactments which have been referred to shew that the justices have no such jurisdiction. That appears to me to go to the root of the whole argument.

Well, then, what else is there in the 4th section? Simply "any process may be issued and indorsed," and so on. All that is machinery; it is such a process as is mentioned before, a process issued under the Summary Jurisdiction Acts. But the 4th sub-section appears to me to be very unfavourable to the argument; because, though neither there nor in any other part of this section is any reference made to bastardy, yet by excluding the Act from applying in Scotland to any case which falls within the definition of "civil jurisdiction" contained in the Summary Procedure Act of 1864, it would in Scotland exclude the whole subject of bastardy proceedings, if indeed that term is properly applicable to anything which could be done in Scotland independently of the 6th section of this Act. A civil remedy of some kind, it is said, would be available in Scotland in favour of the woman. I doubt whether that is material, for it would be, as far as I can gather, a remedy of a different kind from an affiliation order in a bastardy proceeding. But, at all events, of whatever kind it may have been, it would be a civil proceeding, and beyond all question this 4th sub-section would have excluded any proceeding of that kind from the jurisdiction of a Scotch Court under that 4th section.

The next thing which I have to observe is, that, while these provisions clearly do not give the jurisdiction, as I have said, but

H. L. (E.) 1884 BERKLEY v. THOMPSON. Earl of Selborne, L.C.

assume it, the 6th section gives jurisdiction, and gives jurisdiction as to this particular class of cases. It is the only section in the Act which deals with those cases, and it deals with them in a manner which to my mind conclusively implies that nothing else in the Act was intended to give any such jurisdiction. When it was intended to give a new jurisdiction, it was done in proper words. When the Act simply dealt with the mode of serving process issued out of Court under other Acts, you must look to those other Acts to see whether there is jurisdiction or not. But this 6th section does say that "a Court of summary jurisdiction in England and a Sheriff Court in Scotland shall respectively have jurisdiction by order or decree to adjudge a person within the jurisdiction of the Court to pay for the maintenance and education of a bastard child of which he is the putative father," and the other expenses there mentioned, "notwithstanding that such person" (that is the putative father) "ordinarily resides, or the child has been born, or the mother of it ordinarily resides, where the Court is English, in Scotland, or, where the Court is Scotch in England, in like manner as the Court has jurisdiction in any other case." Those last words clearly mean in any other case in which the Court has jurisdiction. And therefore the effect of that 6th section is, not to provide that in those cases a man who is alleged to be the father of a bastard child shall be capable of being compulsorily brought within the jurisdiction of a Court to the jurisdiction of which he is not subject either ratione personæ or ratione loci, but that a Scotch Sheriff Court shall now have given to it for the first time an ordinary bastardy jurisdiction as against a person within the jurisdiction of that Court, and that for that purpose the condition which is expressed in the Acts of 1844 and 1872, that the mother must apply to the justices of the place where she resides, is not to be applicable. The Scotch Sheriff Court is to have jurisdiction not over people in England but over people within the jurisdiction of the Scotch Sheriff Court, notwithstanding that the mother ordinarily resides in England. Again, in England there might have been objections taken; first of all if the father was found in a place where the mother did not ordinarily reside; that is cut off—the English justices, if he is within the jurisdiction of the Court, may exercise jurisdiction

over him; and there were other objections, which, whether valid or not, the legislature thought it at all events worth while to exclude, depending upon the place where the child might have been born, and depending upon the place where the putative father ordinarily resided—those are all excluded. But this jurisdiction is not given either in England or in Scotland as against a person not within the jurisdiction of the Court, but only as against a person within that jurisdiction, wherever he is. If he be either in England or in Scotland the section supplies the means of reaching him, and relieves the mother from difficulties to which she might otherwise have been subject, reaching him by means of a Court within whose jurisdiction he is.

Then I ought to mention that the words which follow, though no doubt they are applicable only to "a process to enforce obedience to such order or decree," yet are strong to shew that the legislature did not imagine that they had already been dealing with that subject; for they say that any such process "may be endorsed and executed in Scotland and England respectively in manner provided by this Act with respect to process of a Court of summary jurisdiction,"—words which I think could hardly have been used, if the previous clause, the 4th clause, as to process of a Court of summary jurisdiction, had the operation which has been contended for.

This it was attempted to meet, by suggesting that the words "to adjudge a person within the jurisdiction of the Court to pay for the maintenance" did not mean what they appear to say, that the person must be found within the jurisdiction of the Court; but that they meant, "constructively within the jurisdiction," because process had been served upon him in the manner provided by the 4th section. But he is not within the jurisdiction because process has been served upon him. The legislature has not said that a process served under the 4th section is to give jurisdiction when there is no jurisdiction without it. It has not said that when there is jurisdiction without it, such a person is to be deemed a person within the jurisdiction of the Court. The jurisdiction of the Court is independent of that. He is not within the jurisdiction of the Court unless he is found there, unless it be that something else, either in the nature of the

H. L. (E.) 1884 BERKLEY v. THOMPSON. Earl of Selborne, L.C.

cause of action or otherwise, gives the Court jurisdiction. So that the argument is really reasoning in a circle—it assumes that, notwithstanding these express provisions in the 6th section, the 4th section, which is merely for service of process, is meant to give an enlarged jurisdiction; and having assumed that, it then applies the words "within the jurisdiction" to the jurisdiction so assumed to be enlarged. But the foundation of the argument fails. There are no words which give jurisdiction in the 4th section at all. The words of that section, leaving the question of jurisdiction to be determined aliunde, simply provide for the manner in which process, competently issued by a Court of summary jurisdiction under the Summary Jurisdiction Acts, may be served in Scotland.

I do not think it necessary to detain your Lordships further. I move that the appeal be dismissed. It being a pauper appeal, there will be no costs.

LORD BLACKBURN:—

My Lords, I am of the same opinion. Whatever might have been the doubt as to whether the case of *Reg.* v. *Lightfoot* (1) was right or not on the Act which was then in force, there can be no doubt, I think, after the Bastardy Laws Amendment Act of 1872, which confirms that. That statute was passed on the supposition that the law as laid down in *Reg.* v. *Lightfoot* (1) was the right law, and that a bastardy summons which was confined to England could only be served upon a person when he was in England. A part of the Act, namely sect. 3, enacts that there shall be a twelvemonth to issue process, but that if the man has left the country within that twelvemonth there may be an enlarged period after he returns. All that tends to shew clearly that the legislature was thinking that such was the law, and that so it was.

That being so, it is said (and for aught I know it may be correctly said) that there was a practical grievance to be met with in the border counties in this respect, that the man against whom the parish officers and the woman together might have got a summons, might have crossed the border and might be living

(1) 6 E. & B. 822; 25 L. J. (M.C.) 115.

on the other side of the border—perhaps he might have been originally resident on the other side of the border, but the woman might have come into England and had her child there. It was said that there was a grievance in this way, that he could laugh them to scorn. I do not know whether it would be much of a grievance or not, but if the legislature were going to pass an enactment to meet it, there were two courses, either of which they might take. One would be to say, Where a person is in Scotland under such circumstances that if he were in England you could procure an affiliation order against him, we will give the power to a Scotch Court to make it. That would be one way of doing it. That would naturally be accompanied by saying, in the same manner, that if a Scotchman has come into England, or an Englishman who has done the act in Scotland is resident in England, there would in that case be a similar power given to get an order against him in England. That would be one mode; and it seems to me certainly that by sect. 6 of the Act of 1881 the legislature has given that power in plain and express terms.

Another way would be to say that a summons for an affiliation order, which by the law of England can only be served upon a person who is within the realm of England, might be served in Scotland by some process or other. It has been attempted to be argued that sect. 4 applies to that and that it means to say that a summons, if duly indorsed by a Court of jurisdiction in Scotland, might be served in Scotland. That point does not arise here at all because the summons evidently never was indorsed. There is no pretence for saying that there was an indorsement by the Scotch Court upon this summons. The parties in Sunderland all evidently thought that the Act of 1872, under which they had power to serve a summons out of the jurisdiction of the magistrates, but within the realm of England, applied to the realm of Scotland; in that they were clearly mistaken, and they did not think of getting an indorsed summons. As to that it occurred to me that there would have been some justice perhaps (whether it would have been worth while to pass an enactment for that purpose might be another question) in saying that where an Englishman had fled from England in order to escape process and had gone into Scotland you might follow him into Scotland

H. L. (E.) 1884 BERKLEY v. THOMPSON. Lord Blackburn.

and serve him in this particular manner. But I do not think that that is what the legislature were thinking of and intended to say. I do think that they have remedied all the real grievance by saying that there shall be a similar power to obtain an affiliation order from the sheriff against a man resident in Scotland. Sect. 6 carefully removes all the difficulties which stood in the way of getting such an order.

LORD WATSON:—

My Lords, I have come without difficulty to the same conclusion. At the time when it was sought to institute the present suit against the respondent, the Bastardy Acts conferred no jurisdiction upon the justices to cite before them or to make a party to a proceeding under these statutes a Scotchman domiciled in Scotland and resident at the time in that country. In the present case the magistrates could only entertain such a proceeding at the instance of a woman who was resident within the limits of their local jurisdiction. The appellant was resident at the time within the jurisdiction of the justices before whom the summons was taken out, but the respondent was at that time domiciled and resident in Scotland.

It is said however that the jurisdiction of the Courts of summary jurisdiction in England has been so enlarged by the statute of 1881 that it is now competent for such a Court in a proceeding like the present to bring before it a domiciled Scotchman who is not in England at the time when service is sought to be made upon him; and in support of that proposition two clauses in the Act of 1881 are relied upon. The first of these is the 4th, and I shall only say of that section of the statute that in my opinion it merely provides for and regulates the mode of service in cases where the Courts of summary jurisdiction either had previously possessed jurisdiction to issue process or had that jurisdiction conferred upon them by the Act in question. The previous Summary Jurisdiction Acts gave no jurisdiction as against the respondent. Of course if the 6th clause of the statute gave that jurisdiction against the respondent, then service could be made upon him in Scotland in terms of sect. 4. It is necessary therefore to look at the terms of sect. 6.

Now at the date of this Act justices in England and the sheriff in Scotland had jurisdiction in regard to allowances to a bastard child. The jurisdiction exercised in the two countries was not precisely of the same kind or quality, still, the legislature were not dealing with any new matter—they were either adding to the jurisdiction respectively possessed by these Courts so as to make it extend over Great Britain, as was contended by the appellant, or they were simply enlarging the jurisdiction of the justices in the one country, and the jurisdiction of the sheriff in the other. The clause provides that they shall have jurisdiction to adjudge a person within the jurisdiction of the Court to pay for the maintenance and education of a bastard child (to take the case of the English Courts) notwithstanding these three circumstances, first that the mother shall not be ordinarily resident within the local limits of their jurisdiction (the words are "notwithstanding that the mother ordinarily resides in Scotland"); secondly, notwithstanding that the child has been born in Scotland; and, thirdly, notwithstanding that the person alleged to be the father of the child shall also be ordinarily resident in Scotland.

It appears to me that all that the legislature intended to provide by this clause was that in the future exercise of their respective jurisdictions the Courts of the two countries shall not be impeded by any of these facts being set up as a defence. I cannot find anywhere language from which by reasonable implication you can derive the inference that each and every Court of summary jurisdiction is to exercise jurisdiction in bastardy cases over the whole length and breadth of Great Britain. A very large extension of the jurisdiction already existing in the two countries is conferred. In the case of England a woman who is ordinarily resident in Scotland, and whose bastard child has been born there, can sue a man who is ordinarily resident in Scotland, according to my view of the enactment, if she finds him in any part of England where she is residing for the time. But the contention of the appellant that the words "ordinarily resides" mean not only "is generally to be found" in Scotland but "is to be found" there at the time of service, would lead to very strange conse-

(H. L. E.) 1884 BERKLEY v. THOMPSON. Lord Watson.

quences, because in that case, the result would be that any local Court of summary jurisdiction in England could, at the instance of a woman ordinarily resident in Caithness and whose child was born there, summon a man who was residing in Caithness at the time. I cannot put such a forced construction upon the words of the Act. It appears to me that it was designed simply to enlarge the bounds of the old jurisdiction so that certain facts and circumstances which might previously have been pleaded as defences against the exercise of jurisdiction in the Summary Courts of the two countries should no longer impede its exercise. It was not intended to confer that which I have already described as a universal jurisdiction within Great Britain.

I therefore concur in the judgment proposed.

Order appealed from affirmed, and appeal dismissed.

Lords' Journals 4th December 1884.

Solicitors for appellant: *J. E. & H. Scott for John Graham & A. T. Shepherd, Sunderland.*

Solicitors for respondent Duncan: *Duncan, Rooke, & Sons.*

[HOUSE OF LORDS.]

MARY SEWARD . . . . . APPELLANT; H. L. (E.) 1884 Dec. 2.

AND

THE OWNER OF THE "VERA CRUZ" . RESPONDENT.

THE "VERA CRUZ."

Ship—Jurisdiction of Admiralty Division—Action in rem—Action under Lord Campbell's Act—9 & 10 Vict. c. 93—Admiralty Court Act 1861 (24 *Vict. c.* 10) *ss.* 7, 35.

The Admiralty Court Act 1861 (24 Vict. c. 10) which by sect. 7 gave the Court of Admiralty "jurisdiction over any claim for damage done by any ship," did not give jurisdiction over claims for damages for loss of life under Lord Campbell's Act (9 & 10 Vict. c. 93); and the Admiralty Division cannot entertain an action in rem for damages for loss of life under Lord Campbell's Act:—

So *held* affirming the decision of the Court of Appeal.

The Franconia (2 P. D. 163) overruled.

APPEAL from an order of the Court of Appeal, reported as *The Vera Cruz* (No. 2) (1).

The appellant on the 23rd of November 1882 issued a writ addressed to "the owners and parties interested in the ship *Vera Cruz* of the port of Liverpool (and in the freight and cargo thereof)," and indorsed as follows:—"The plaintiff as administratrix with the will annexed of her husband W. Seward deceased late master of the vessel claims £1000 against the owners of the ship *Vera Cruz* and her freight for damages for the loss of W. Seward's life and for the loss of the life of her son T. W. Seward occasioned by a collision which took place at the mouth of the Mersey in August 1882."

The writ was served at Liverpool by affixing it to the mainmast of the *Vera Cruz* on the 14th of July 1883.

The respondent appeared under protest and filed a petition on protest which contained the following allegations:—

The plaintiff is a British subject resident in Lancashire. The defendant is a subject of the King of Spain and resident in Spain,

(1) 9 P. D. 96.

H. L. (E.) 1884 SEWARD v. "VERA CRUZ."

and is the sole owner of the *Vera Cruz*, a Spanish vessel belonging to Bilbao and not registered in the United Kingdom. In August 1882 the *Vera Cruz* was in the Crosby Channel on a voyage from Liverpool to Spain and in the Crosby Channel came into collision with the British vessel *Agnes*. By reason of the collision the *Agnes* was sunk, and her master and some of the crew drowned. The *Vera Cruz* being in Liverpool on the 13th of July 1883 was on that day arrested in a suit in rem brought in the Admiralty Division by the owners of the *Agnes* to recover damages for the collision. Bail having been given in the action brought by the owners of the *Agnes* the *Vera Cruz* was released, and sailed from England on the 17th of July 1883. This Court has no jurisdiction to entertain the present cause of damages for loss of life, and the service of the writ on the *Vera Cruz* is irregular and void.

The petition prayed the Court to pronounce against the jurisdiction and to dismiss the suit.

The plaintiff in reply alleged that the Court had jurisdiction and that the service of the writ was valid.

Butt J. overruled the protest, on the authority of *The Franconia* (1). The Court of Appeal (Brett M.R. Bowen and Fry L.JJ.) reversed this decision and held that the Court had no jurisdiction (2). From this decision the plaintiff appealed.

Nov. 28, Dec. 1, 2. *Gainsford Bruce* Q.C. and *D. French* for the appellant:—

The question is whether, as the appellant contends, the Admiralty Division has jurisdiction to entertain an action under Lord Campbell's Act (9 & 10 Vict. c. 93) for damages for the death of a person killed by collision with a foreign ship, and to arrest a foreign ship as security. The defendant followed the old practice in the Admiralty Court and appeared under protest. Originally and independently of statute the Court of Admiralty exercised jurisdiction over all torts on the high seas; see *The Volent* (1842) (3); *The Hercules* (1819) (4); *The Ruckers* (1801) (5); *The Lagan or Mimax* (1838) (6). In *De Lovio* v. *Boit* (7) Story J.

(1) 2 P. D. 163.
(2) 9 P. D. 96.
(3) 1 Wm. Rob. 383.
(4) 2 Dod. 353.
(5) 4 C. Rob. 73.
(6) 3 Hagg. Adm. 418.
(7) 2 Gallison Rep. 398.

held that the Admiralty Court had jurisdiction over all torts committed on the high seas, and in harbours within the ebb and flow of the tide.

The statutory jurisdiction is regulated by several Acts. In 3 & 4 Vict. c. 65 s. 6 no distinction is made between damages done and damages received by ships. After the decision in *The Bilbao* (1) came the Admiralty Court Act 1861 on which the present question mainly turns. Sect. 7 enacts that "the Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." These words are large enough to include the present case. The principle of assessing the damages must be regulated by Admiralty practice as was done by Butt J. on the hearing of this case (2), giving the plaintiff half the damage she has sustained, both ships being held to blame.

At the time this Act passed Lord Campbell's Act (9 & 10 Vict. c. 93) was in force. Lord Campbell's Act did not create a fresh cause of action, it only removed the difficulty arising from the rule "actio personalis moritur cum personâ," and prevented the action dying: *Read* v. *G. E. R. Co.* (3).

[LORD BLACKBURN referred to *Pym* v. *G. N. R. Co.* (4).]

Sect. 2 of Lord Campbell's Act which provides for the distribution of damages by a jury, creates no difficulty, for since the Judicature Acts a jury may be summoned in the Admiralty Division. That Act no doubt contemplates a personal action: but this proceeding in the Admiralty Division though a proceeding in rem (for the only service was on the ship) is also inter partes. A proceeding is in rem whenever the service is on property, within the jurisdiction, of a person resident out of the jurisdiction. The words of sect. 35 of 24 Vict. c. 10 are large enough to include proceedings in rem. Actions for personal damage not resulting in death can be brought in the Admiralty Division. The nature of maritime lien upon ships and the jurisdiction of the Admiralty Court are discussed in Clerke's Admiralty Practice (1722) tits. 24, 28, and *The Bold Buccleugh* (5). The decision in *The Two Ellens* (6) shews that the Admiralty

(1) Lush. 149.
(2) 9 P. D. 88.
(3) Law Rep. 3 Q. B. 555.
(4) 4 B. & S. 396; 32 L. J. (Q.B.) 377.
(5) 7 Moo. P. C. 267.
(6) Law Rep. 4 P. C. 161.

H. L. (E.) 1884 SEWARD v. "VERA CRUZ."

may have jurisdiction over property, without having a maritime lien. That the legislature intended the Admiralty to deal with some claims under Lord Campbell's Act appears from the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) s. 514 which gave jurisdiction to the Court of Chancery over the liability of shipowners "in respect of loss of life." From that time damages under Lord Campbell's Act could be assessed without a jury; by the Court of Chancery under the Merchant Shipping Act 1854, and (later) by the Admiralty Court under 24 Vict. c. 10 s. 13. A wide construction should be placed on the words in sect. 10 "damage done by any ship;" that is the principle of the following decisions, viz., in cases of injury to barges and ships: *The Malvina* (1); *The Diana* (2); *The Sarah* (3); in cases of injury to wharfs, piers, breakwaters or cables, *The Uhla* (4); *The Excelsior* (5); *The Industrie* (6); *The Clara Killam* (7); in cases of injury to persons, *The Sylph* (8); *The Beta* (9); and under Lord Campbell's Act, *The Guldfaxe* (10); *The Explorer* (11).

The decision in *Smith* v. *Brown* (12) no doubt conflicts with the decision in *The Beta* (9), and with the appellant's contention here. The objection was there raised that the legislature did not intend the Admiralty rule as to division of damages where both ships are to blame to apply to cases of personal injuries: but this objection is done away with by the Judicature Act 1873 (36 & 37 Vict. c. 66) s. 25 sub-s. 9. In *Ex parte Gordon* (13) the United States Supreme Court held that the Admiralty Court had jurisdiction over suits for damages for death caused by collision, and that prohibition would not lie, and declined to follow *Smith* v. *Brown* (12), preferring *The Franconia* (14).

The jurisdiction claimed by the appellant is a very convenient one, and it saves multiplicity of suits and conflicts between the decisions of the Admiralty Division and juries. Where the offending ship is foreign, as here, the representatives of the

(1) Lush. 493; Brown. & Lush. 57.
(2) Lush. 539.
(3) Lush. 549.
(4) Law Rep. 2 A. & E. 29, n.
(5) Law Rep. 2 A. & E. 268.
(6) Law Rep. 3 A. & E. 303, 307.
(7) Law Rep. 3 A. & E. 161.
(8) Law Rep. 2 A. & E. 24.
(9) Law Rep. 2 P. C. 447.
(10) Law Rep. 2 A. & E. 325.
(11) Law Rep. 3 A. & E. 289.
(12) Law Rep. 6 Q. B. 729.
(13) 14 Otto, 515.
(14) 2 P. D. 163.

person killed have practically no remedy except by an action in rem.

Objections were taken in the Court below: 1 as to the inconvenience of a jury; 2 as to the difficulty of applying the principle of division of damages. The answer is that those very difficulties had already arisen under Part IX. of the Merchant Shipping Act 1854 and had to be encountered in the Court of Chancery, to which jurisdiction was given by s. 514.

The Admiralty Court Act 1861 s. 13, applied Part IX. to the Admiralty Court, after seven years experience of the working of Part IX. in the Chancery Court. In limitation suits it is clear that both the Chancery and the Admiralty Division have jurisdiction over claims for damages for loss of life. As to the objection that if the balance of damages were taken it might be found to be against the deceased, that difficulty now arises similarly with regard to cargo.

[EARL OF SELBORNE L.C.:—Lord Campbell's Act says "whensoever the death of a person shall be caused by wrongful act, neglect or default." Are those words applicable to an inanimate thing like a ship, which is not capable of doing wrong?]

In nautical language the ship is spoken of as the wrongdoer. In the early sections of 24 Vict. c. 10 the ship is made responsible not only for torts but for contracts. The essentials of a cause of action under Lord Campbell's Act are admitted in the protest in the present case, viz:—1 the killing; 2 the death being caused by the default of the *Vera Cruz*; 3 the death being caused under such circumstances as would have given the deceased a cause of action if he had not died.

Dr. *Phillimore* and *T. T. Bucknill* for the respondent were not heard.

EARL OF SELBORNE L.C.:—

My Lords, both Mr. Gainsford Bruce and Mr. French have argued this case with so much ability that your Lordships have received all that assistance which it would be possible for counsel to give in order to appreciate the question to be now decided,

H. L. (E.) 1884 SEWARD v. "VERA CRUZ." Earl of Selborne, L.C.

and therefore as the result has been to satisfy your Lordships that the judgment appealed from is right notwithstanding the very considerable conflict of opinion and authority which there was upon the point before, it does not seem to your Lordships necessary to call upon the learned counsel on the other side.

This is an action in rem essentially. By the rules of Court there are certain provisions made for actions in rem in the Probate, Divorce and Admiralty Division as distinct from the ordinary class of actions. Although it might have been possible to bring an ordinary action, in all respects of the same kind as could be brought in the Queen's Bench Division, in the Probate, Divorce, and Admiralty Division, and though I should be far from entertaining any doubt as to the jurisdiction of that Division to deal with such an action in this as in any other case, (but not more in this than in any other case,) if no objection were taken and no transfer asked for or made, yet this is not an action of that kind. This is an action brought in a form appropriate to actions in rem in the Admiralty Division, of the same kind as might have been brought in the Court of Admiralty before the Judicature Acts were passed, and this question must be determined exactly in the same manner as if the action had been so brought and as if the Judicature Acts had never been enacted.

Now the question whether such an action lies or not depends altogether upon the construction and effect of the 7th and 35th sections of the Admiralty Court Act of 1861. I do not myself think that there are any other sections in that Act which are material to the question to be determined. What is noticeable is, that most of the sections are expressed in definite terms, leaving no opening for any doubt or question as to the particular cases in which a new jurisdiction is to be given or an old jurisdiction extended to the Admiralty Court. But this 7th section is expressed in perfectly general words—"The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship;" and the question which your Lordships have to determine is what is meant by these words, "claim for damage done by any ship," whether they can, according to sound principles of construction be held to include such causes

of action as arise under Lord Campbell's Act when death has occurred by reason of the "wrongful act, neglect, or default" of some other person.

That 7th section must be construed with the 35th, on which no doubt this action is founded:—"The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings in rem or by proceedings in personam." That section undoubtedly, according to the natural meaning of the words, shews, that while an option to proceed in rem or in personam is given as to the jurisdiction conferred by the Act, yet from the very nature of such an option every case provided for by the Act is regarded as a proper case for a proceeding in rem; and accordingly the appellant, considering that the 7th section brought cases under Lord Campbell's Act within the purview of the Admiralty jurisdiction, justly upon that hypothesis held it to mean such actions as were capable of being brought by a proceeding like the present in rem; and if the action cannot be so brought, then I apprehend it will follow ex converso that the 7th section does not extend to this description of claim.

Now one thing is quite clear, and that is, that whether this particular kind of action can be brought within those words does not depend upon any expressed intention of the legislature to bring it within the clause, for there is not the slightest reference whatever in that clause to any particular case or class of cases. If it necessarily or properly comes within the words, "any claim for damage done by any ship," according to the reasonable construction of those words in connection with the clause which authorizes proceedings in rem to enforce such claim, then no doubt the words, being general, would include it; but express or special inclusion is certainly not indicated. Upon that point I cannot but observe that the argument founded on the 13th section in the Act seems to me not to assist the appellant, because when the legislature did intend, under certain special conditions, to deal with cases of which this might be one, it has done so, and that in so many words, and a reference to the jurisdiction given to the Court of Chancery in England by the ninth part of the Merchant Shipping Act, 1854, makes the intention definite and clear. But there is nothing of that kind in this section, and

H. L. (E.) 1884 SEWARD v. "VERA CRUZ." Earl of Selborne, L.C.

unless the proposition can be made out that this kind of action necessarily, or at all events legitimately, falls within the words "claim for damage done by any ship," there is not the smallest indication of any intention of the legislature to include it.

It must be remembered that Lord Campbell's Act is the source of the right if the right exists, and we must look to that Act to see whether a claim made under that Act can naturally or properly be described as a "claim for damage done by any ship." The first observation which occurs is this—there is not a word about ships in Lord Campbell's Act. It is an Act which deals with a category of cases, which may include injuries done by persons responsible for the navigation of ships to persons suffering by faults in that navigation, but it only includes them as part of a much larger and more general category of cases, and without any express reference to or mention of any particular case which may fall under that category. Therefore no one can say that Lord Campbell's Act relates expressly to claims for damage done by ships; and this section in the Act of 1861 relates to that and to nothing else—maritime damage by ships is the subject of that legislation; general injuries resulting in loss of life by wrongful acts and so forth are the subject of the other. It is not very likely that when the legislation goes on such different lines it should be intended indirectly to affect by the one legislation, and in a peculiar manner, a particular case which may or may not arise under the other legislation.

But that is not all. Inasmuch as there can be no right of action whatever unless it comes within the terms of Lord Campbell's Act, let us see whether those are terms which can be brought reasonably and naturally and consistently within the interpretation sought to be imposed on the 7th section of the Act of 1861, which statute turns the action into an action in rem at the option of the plaintiff. Now what are the words? "Whensoever the death of a person shall be caused by wrongful act, neglect, or default"—all words plainly applicable only to a person doing an act or guilty of a neglect or default, and not to an inanimate instrument or thing like a ship—"and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover

damages in respect thereof"—"to maintain an action and recover damages" plainly points to a common law action—"then and in every such case *the person* who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured." Well, it is to my mind, as plainly as possible, a personal action given for a personal injury inflicted by a person who would have been liable to an action for damages, manifestly in the common law courts, if the death had not ensued. Lord Campbell's Act gives a new cause of action clearly, and does not merely remove the operation of the maxim, "actio personalis moritur cum personâ," because the action is given in substance not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, no doubt suing in point of form in the name of his executor. And not only so, but the action is not an action which he could have brought if he had survived the accident, for that would have been an action for such injury as he had sustained during his lifetime, but death is essentially the cause of the action, an action which he never could have brought under circumstances which if he had been living would have given him, for any injury short of death which he might have sustained, a right of action, which might have been barred either by contributory negligence, or by his own fault, or by his own release, or in various other ways. Every word of that legislation being, as it appears to me, legislation for the general case and not for particular injury by ships, points to a common law action, points to a personal liability and a personal right to recover, and is absolutely at variance with the notion of a proceeding in rem.

But the matter does not stop there, because the peculiarity of the legislation is this, that the action being given for the benefit of the wife, or husband, parent and children of the dead person, "the jury" (it is assumed that there would be a jury) "may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered

H. L. (E.) 1884 SEWARD v. "VERA CRUZ." Earl of Selborne, L.C.

from the defendant, shall be divided amongst the before mentioned parties in such shares as the jury by their verdict shall find and direct;" and there are some other provisions, one as to the time within which the action is to be brought, another as to what the plaintiff is to do:—"In every such action the plaintiff on the record shall be required, together with the declaration, to deliver to the defendant or his attorney a full particular" and so on. It is impossible not to see, and the proposition is too clear to admit of dispute, that if the 7th section of the Act of 1861 has the effect of transferring that action to the Court of Admiralty to be brought under the Admiralty Rules and system, tried without a jury, and enforced in rem and not in personam, without making any person individually a defendant as liable to an action for damages, without making any person a defendant on the record and declaring against him, to whom or to whose attorney full particulars can be delivered and so on, the Act of 1861 has materially varied the effect of the Act which gives the right of action.

Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so. For that principle I may refer to *Hawkins* v. *Gathercole* (1). That case arose under the Judgment Act, 1 & 2 Vict. c. 110, s. 13, which provided that a judgment should be binding, inter alia, on all the interest of the debtor in "lands, tenements, rectories, advowsons, tithes," and so forth, and that for the amount of the judgment these different descriptions of property to which he might be entitled should be charged in the same manner as if "the person against whom the judgment should have been entered up had power to charge the hereditaments, and had by writing under his hand agreed to charge them with the amount of the debt." The question arose as to an ecclesiastical benefice. By the restraining Act of Elizabeth a clergyman had no power to charge his benefice, but Lord Cran-

(1) 6 D. M. & G. 1.

worth thought, when the case came before him in the first instance, that those words in sec. 13 relieved him from the want of power indirectly in that particular case, and in favour of the creditor did away with the effect of the restraining Act of Queen Elizabeth, putting him in the situation of a man who could charge, and who had charged. But that decision was reversed: it was held that all those general words about tithes and rectories, and so on, were capable of a reasonable application to subjects not affected by any particular legislation; and that the statute of Elizabeth, not being referred to in any way, the Act being in diversâ materiâ, and not containing the slightest indication of any such intention, was not unnecessarily to be repealed or altered by such general words. I need not read more from the case than the words of Turner L.J. (1). "Can," he says, "the Statute of Elizabeth be held to be practically repealed" (and of course alteration in any important particulars is pro tanto the same) "by such general words as are contained in the 13th section of this statute? I venture to think that it cannot, grounding that opinion upon the authorities to which I have generally referred, and adding to them the 11th Case in Jenkins, fifth century, in which it is thus said, 'A special statute does not derogate from a special statute without express words of abrogation.'" To me it seems to be not only easy but right to construe the words in the Act of 1861 in a sense in which they are quite inapplicable to this particular cause of action, and leave all the provisions of Lord Campbell's Act in full force and effect, not modified or interfered with; because in truth "damage done by any ship" was a form of expression naturally applicable to that description of damage, maritime damage, as to which, in cases falling within the jurisdiction of the Admiralty Court, the ship was treated as, so to say, in delicto, and was liable to a proceeding in rem, such as the 35th section contemplated.

I think that I have said all that is really necessary. The argument from the Merchant Shipping Act, as it appears to me, manifestly fails. There—where the legislature did intend, for certain purposes, for the purpose of giving effect to the limited liability and administering a fund brought into Court to answer

(1) 6 D. M. & G. 31.

H. L. (E.) 1884 SEWARD v. "VERA CRUZ." Earl of Selborne, L.C.

that liability, that this description of claim against the owners of the ship should be brought into account as well as other claims, it made provisions giving a jurisdiction to the Court of Chancery, which, as it was exercisable by the Court of Chancery and not otherwise, has since been transferred to the Court of Admiralty,—it made provision giving a jurisdiction in those cases to the Court of Chancery, in order to effect the express and manifest intention of the legislature for that particular and limited purpose, and it would involve so much, and only so much modification of the provisions of Lord Campbell's Act as might be necessary to give effect to the intention so declared. But there is nothing of that kind here. What you have bearing upon that subject is in the enactment which applies only to the case of competing claims, and the case where the rule of limited liability is to be applied, and a fund is brought into Court to answer it. That is not the case here.

The judgment appealed from appears to me to be entirely right, and I move your Lordships to dismiss the appeal, with costs.

LORD BLACKBURN :—

My Lords, I am entirely of the same opinion. Before Lord Campbell's Act, where a person had been injured from any of the causes mentioned in the first section of that Act and had died, the maxim Actio personalis moritur cum personâ applied, he could not sue, for he was dead, and it did not survive to anybody whomsoever to sue for the damages occasioned by the accident which had caused injury to him resulting in death. That Lord Campbell, or rather the legislature at the instance of Lord Campbell, thought fit to alter; and I think that when that Act is looked at it is plain enough that if a person dies under the circumstances mentioned, when he might have maintained an action if it had been for an injury to himself which he had survived, a totally new action is given against the person who would have been responsible to the deceased if the deceased had lived; an action which, as is pointed out in *Pym* v. *Great Northern Railway Company* (1), is new in its species, new in its quality, new

(1) 2 B. & S. 759; 4 B. & S. 396.

in its principle, in every way new, and which can only be brought if there is any person answering the description of the widow, parent, or child, who under such circumstances suffers pecuniary loss by the death. That is a personal action, if personal action there ever can be. It is quite plain (it does not require much more than to state it) that if a man who has the custody and management of a ship manages it in such a way that by his negligence or from any other cause which is mentioned in sect. 1 a person is killed, that man is liable under Lord Campbell's Act; and also if that man is a servant acting for a superior (the shipowner is generally speaking the person), if he is the servant of the shipowner who is the principal, the shipowner is answerable under this cause of action.

That being so, the legislature by the Merchant Shipping Act of 1854, when they were renewing former enactments which limited the liability of a shipowner according to the value of his ship, thought fit to say, If the owner of the ship is as such made liable under Lord Campbell's Act (for that is what they meant) it shall be included in those claims which are to be divided rateably according to the value of the ship to which the liability of the shipowner is limited; and a jurisdiction was given by the 514th section to the Court of Chancery to enforce the limitation of the liability, and for that purpose it had various collateral powers.

Now that was the state of things in 1854 and down to 1861, and I think there cannot be the least doubt that at that time the remedy which the widow, parent, or child would have, the action being brought in form by the administrator with all the provisions which have been already read providing that the matter should be properly done, would be a personal action and a personal action only, and whether the liability of the person who was sued was because he was the owner of the ship, in which case he would have a limit to his liability under the Act of 1854, or because he was the owner of a stage coach, it would be a personal liability and a personal liability only. Now the legislature undoubtedly had full power to enact that the Court of Admiralty should have what jurisdiction they chose to give it. The question really, when it is looked at, depends upon the construction of the 7th section

H. L. (E.) 1884 SEWARD v. "VERA CRUZ." Lord Blackburn.

of the Admiralty Court Jurisdiction Act (for I do not think that any of the others really go to it or throw any light upon it), the words there used being that the Court of Admiralty shall have jurisdiction over any claim for damage done by any ship. That being so, what do these words mean? If the question now raised had been that which the Court of Queen's Bench, of which I was then a member, treated as raised in *Smith* v. *Brown* (1)—that really was a case under Lord Campbell's Act, and under Lord Campbell's Act only, but it was treated as general—if the question now raised had been whether personal damage to a man who lived was within that 7th section of the enactment, I should have had, as I then had, some doubt about the matter, and it would have carried me so far that if that had been the question now raised I certainly should have wished to hear the case argued out to the end before giving an opinion upon it one way or the other. But the question raised here being exclusively whether the liability of a shipowner as a person, under Lord Campbell's Act, to make good damages for the negligence of his servant, who happens to be the master of the ship, comes within the words "damage done by any ship," I decidedly say that I do not think it does. The legislature in using such general words as those cannot have had in contemplation all the numerous and important subjects which, had they been considering Lord Campbell's Act, they would have had. For instance, no one seems to have thought of the case of a Swedish ship or a French ship on the high seas drowning an Englishman and afterwards coming into England. There would have been a very serious international question raised in that case whether the English legislature had enacted (as it beyond doubt had full power to enact) that when the ship came into England there should be power to enforce against the Frenchman or the Norwegian reparation for the loss of life which his own law did not give, though the accident which caused it happened on the high seas. In this particular instance the Spaniard's ship is in the Mersey and is in English waters when the occurrence takes place; but the point upon the construction of the Act of 1861 would have been just the same if the collision by which the accident had occurred had been in the Bay of

(1) Law Rep. 6 Q. B. 729.

Biscay, there would have been no difference that I can perceive in the matter, and that is obviously a very serious question indeed, which should be carefully considered in inquiring whether the legislature when passing that Act intended it to have any such meaning. That is no reason for saying that if the words of the statute plainly and obviously have that meaning, and shew that that was intended, foolish and rash and improvident as we may think it to have been, we must not give them that effect. But when the question comes to be whether there are words in any way pointing to liability under Lord Campbell's Act, or to the defendant's liability under Lord Campbell's Act, that seems to me to be a very strong argument indeed for saying that the words are not to be so construed, and consequently that the Court of Admiralty had not in 1862 any such jurisdiction as is now claimed.

LORD WATSON:—

My Lords, notwithstanding the very full and able argument which has been addressed to the House by the counsel for the appellant, I entertain no doubt that a right of action such as is given by Lord Campbell's Act in a case like the present is not a "claim for damage done by a ship" within the meaning of the 7th section of the Admiralty Court Act 1861. Upon that ground, and upon that ground only, I am of opinion with your Lordships that the appeal ought to be dismissed.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 2nd December 1884.

Solicitors for appellant: *Leslie & Hardy for Bradshaw & Townsend, Barrow-in-Furness.*

Solicitors for respondent: *Gregory, Rowcliffes & Co. for Hill, Dickenson & Co., Liverpool.*

Dictum of LORD BRAMWELL at p. 105, *applied.* THE ARDENNES. [1950] 2 All E.R. 517.

Considered. ARDENNES (CARGO OWNERS) *v.* ARDENNES. [1951] 1 K. B. 55

[HOUSE OF LORDS.]

H. L. (E.) 1884 Dec. 5.

J. SEWELL AND NEPHEW . . . . . APPELLANTS;

AND

JAMES BURDICK ON BEHALF OF HIMSELF AND OTHERS, THE OWNERS OF THE STEAMSHIP "ZOE" . . . . . RESPONDENT.

Ship—Indorsee of Bill of Lading—"Passing of property" in Goods shipped—Indorsement by way of Pledge—Bills of Lading Act (18 & 19 *Vict. c.* 111) *s.* 1.

The mere indorsement and delivery of a bill of lading by way of pledge for a loan does not pass "the property in the goods" to the indorsee, so as to transfer to him all liabilities in respect of the goods within the meaning of the Bills of Lading Act (18 & 19 Vict. c. 111) s. 1.

Goods were shipped to a foreign port under bills of lading making the goods deliverable to the shipper or assigns. After the goods had arrived and been warehoused the shipper indorsed the bills of lading in blank and deposited them with the indorsees as security for a loan. The indorsees never took possession of or dealt with the goods:—

Held, reversing the judgment of the Court of Appeal, and restoring the judgment of Field J., that "the property" in the goods did not "pass" to the indorsees within the meaning of the Bills of Lading Act so as to make them liable in an action by the shipowner for the freight.

APPEAL by the defendants from an order of the Court of Appeal (1) reversing a decision of Field J. The facts are fully set out in the judgment of Field J. (2). Briefly they were as follows:—

In September 1880 Nercessiantz shipped machinery on the respondent's ship to be carried from London to Poti in the Black Sea, under bills of lading whereby the goods were made deliverable to the shipper or assigns, freight, primage, and disbursements to be paid at destination, in default the owners or agents to have an absolute lien on the goods and liberty to sell by auction and retain freight and all charges. The bills of lading indorsed in blank were in November 1880 deposited by Nercessiantz with the appellants, bankers in Manchester, as security for a loan of £300

(1) 13 Q. B. D. 159. (2) 10 Q. B. D. 363.

advanced by them to Nercessiantz. The ship meanwhile had arrived at Poti in September, and the goods were landed and warehoused at the Russian custom-house in October. Nercessiantz disappeared, and after a year the goods in accordance with Russian law were sold to pay custom-house duty and charges, and realized no more than enough for that purpose. Meanwhile the appellants had indorsed the bills of lading to their agents at Tiflis with instructions to protect their interests, and had informed the shipowners that if the goods were sold to pay freight &c. the appellants claimed all the proceeds over and above the amount due to the shipowners for freight &c., but the appellants never claimed delivery of the goods. The respondent having brought an action for £174 8*s.* 9*d.* for freight and charges, against the appellants as indorsees of the bills of lading, Field J. who tried the case without a jury gave judgment for the defendants (1). The Court of Appeal (Brett M.R. and Baggallay L.J., Bowen L.J. dissenting) set aside this judgment and gave judgment for the plaintiff for the amount claimed (2). The defendants appealed.

Nov. 4, 6, 7. Sir *F. Herschell* S.G. (*Danckwerts* with him) for the appellants:—

The transaction between Nercessiantz and the appellants was not intended to be and was not a sale out and out of the goods but a pledge only. A contract of pledge leaves the property in the pledgor and passes only a special property to the pledgee: *Franklin* v. *Neate* (3). If the object of the indorsement of the bill of lading be to create a contract of pledge, the indorsement will not pass the property any more than delivery of the goods would. According to Brett M.R., *Lickbarrow* v. *Mason* (4) decided that the indorsement of the bill of lading passed the property in all cases, and the judgment of the majority of the Court of Appeal went entirely on that ground. But the only question decided there was whether the consignor had the right to stop in transitu. It seems from Buller J.'s direction in *Hibbert* v. *Carter* (5) and his refer-

(1) 10 Q. B. D. 363.
(2) 13 Q. B. D. 159.
(3) 13 M. & W. 481.
(4) 1 Sm. L. C. 753 (8th ed.); in K. B., 2 T. R. 63; in Ex. Ch., 1 H. Bl. 357; in H. L., 2 H. Bl. 211; 6 East, 20, n., and 5 T. R. 683.
(5) 1 T. R. 745, 748, n.

H. L. (E.) 1884 SEWELL v. BURDICK.

ence to that case in his opinion in *Lickbarrow* v. *Mason* (1) that he cannot have intended to go the length generally attributed to him. The history of the decisions in *Lickbarrow* v. *Mason* (2), their true effect, and the weight to be given to the opinion of Buller J. are fully discussed in Blackburn on Sale pp. 279–289. See also 1 Arnould on Insurance p. 71 (4th ed.) part i. chap 3. The true method of approaching the question is to inquire what is the real contract between the owner of the goods and the lender. The indorsement of the bill of lading has no magical effect. By the custom of merchants the indorsement and delivery of the bill of lading is equivalent to the taking possession of the goods; but the property in the goods does not pass unless it is intended by the contract that it shall pass. There is no direct decision that the mere indorsement of a bill of lading passes the whole property in the goods when it is not so intended; and there are decisions inconsistent with such a proposition. An indorsement by way of pledge passes no property and is not valid as a pledge where the pledgor has no authority to pledge: *Newsom* v. *Thornton* (3). There are two direct decisions that on an assignment of the bill of lading by way of pledge a special property only and not the general property in the goods passes: *Turner* v. *Trustees of Liverpool Docks* (4), and *Jenkyns* v. *Brown* (5). There are dicta both ways in *Meyerstein* v. *Barber* (6) and *Glyn* v. *East and West India Dock Co.* (7). Such transactions are pledges, not mortgages, and do not require a mortgage stamp: *Harris* v. *Birch* (8). As to the nature of pledges, see *Donald* v. *Suckling* (9) approved in *Halliday* v. *Holgate* (10). There is nothing in the Bills of Lading Act (18 & 19 Vict. c. 111) to shew an intention in the legislature that indorsees should be liable on the bill in the case of a pledge. The words in s. 1 "to whom the property in the goods shall pass" refer to cases where it is intended that the whole property shall pass. *Smurthwaite* v. *Wilkins* (11) and *Short* v. *Simpson* (12) decide that where the whole property has

(1) 6 East, 24, n.
(2) 1 Sm. L. C. 753 (8th ed.)
(3) 6 East, 17.
(4) 6 Ex. 543.
(5) 14 Q. B. 496.
(6) Law Rep. 2 C. P. 44, 675; 4 H. L. 317.
(7) 6 Q. B. D. 475.
(8) 9 M. & W. 591.
(9) Law Rep. 1 Q. B. 585.
(10) Law Rep. 3 Ex. 299.
(11) 11 C. B. (N.S.) 842.
(12) Law Rep. 1 C. P. 248.

passed to the indorsee, the indorsee is the only person liable, which would be unreasonable in the case of a mere pledgee for a small amount.

C. Hall Q.C. and *Edwyn Jones* for the respondent, contended that the whole property in the goods passed by the indorsement and delivery of the bill of lading, the Courts having adopted the special verdict found in *Lickbarrow* v. *Mason* (1); that the evidence in the present case shewed that the parties intended that the whole property should pass; that unless the creditor in such a transaction took the whole property he could not sell the goods or transfer the bill of lading to secure himself; that the indorsement entitled the indorsee to sue on the one hand, and made him liable in every respect on the other; e.g. for a general average contribution. They also relied on the reasoning in the judgment of the majority of the Court of Appeal, and referred to the following cases: *Coxe* v. *Harden* (2); *In re Westzinthus* (3); *Spalding* v. *Ruding* (4); *Kemp* v. *Falk* (5); *Short* v. *Simpson* (6); *Pease* v. *Gloahec* (7); *The Figlia Maggiore* (8); *The St. Cloud* (9); *Fox* v. *Nott* (10); *The Nepoter* (11); *The Freedom* (12).

Danckwerts in reply discussed the authorities and referred to *Lloyd* v. *Guibert* (13).

The House took time for consideration.

Dec. 5. EARL OF SELBORNE L.C.:—

My Lords, this appeal raises the question whether under the Bills of Lading Act of 1855 (18 & 19 Vict. c. 111) every holder of a bill of lading, indorsed in blank, who has taken it by way of security for an advance of money (and has not afterwards parted with it) is liable, by reason of such indorsement only, to an

(1) 1 Sm. L. C. 753 (8th ed.)
(2) 4 East, 211, 217.
(3) 5 B. & Ad. 817.
(4) 6 Beav. 376.
(5) 7 App. Cas. 573.
(6) Law Rep. 1 C. P. 248.
(7) Law Rep. 1 P. C. 219.
(8) Law Rep. 2 A. & E. 106.
(9) Brown. & Lush. 4, 18.
(10) 6 H. & N. 630; 30 L. J. (Ex.) 259.
(11) Law Rep. 2 A. & E. 375.
(12) Law Rep. 3 P. C. 594, 598.
(13) Law Rep. 1 Q. B. 115.

H. L. (E.) 1884 SEWELL v. BURDICK. Earl of Selborne, L.C.

action for freight by the shipowner; although he may not have obtained delivery of the goods or derived any other benefit from his security.

The goods in this case were, by the terms of the bill of lading, deliverable at Poti, a Russian port on the Black Sea, and had been landed and warehoused there in a public warehouse (no one appearing to claim or take charge of them) before the date of the indorsement. This was their position when the present action was brought by the respondent, the shipowner, against the appellants, who are bankers at Manchester, and who had advanced £300 to the shipper upon the security of the bill of lading. In his statement of claim the plaintiff alleged that the goods still remained at Poti under the care of the Russian authorities; that the plaintiff had under Russian law no power of selling them for the purpose of paying himself the amount claimed in the action (£174 8*s.* 9*d.* and interest); and that the Russian authorities were about to sell the same for a sum barely sufficient to cover the Customs duties and Government charges thereon. They were, in fact, sold by the Russian authorities, and did not realise more than the amount of those duties and charges.

Under these circumstances, Field J. (who tried the case without a jury) gave judgment for the defendants (the appellants here). That judgment was reversed by a majority (Brett M.R. and Baggallay L.J.) of the judges in the Court of Appeal, Bowen L.J. dissenting.

The difference between those learned judges mainly (if not altogether) turned upon the question, whether, according to the authorities from *Lickbarrow* v. *Mason* (1) downwards, the effect of an indorsement and deposit of a bill of lading, while the goods are in transitu, by way of security for a loan, is to pass the whole legal title to the goods, or only to pledge them, passing at law a "special property" and leaving the "general property" in the shipper. That question was much debated in *Glyn Mills & Co.* v. *East and West India Dock Company* (2) where Brett L.J. expressed the same opinion on which he acted in the present case, Bramwell L.J. taking the opposite view. My noble friend Lord Blackburn, in his opinion on that case, when it reached

(1) 1 Sm. L. C. 753, 8th ed. (2) 6 Q. B. D. 475.

this House adverted to the point but thought it unnecessary to express any opinion upon it (1).

In the present case the true question is whether "the property" in the goods "passed to the indorsee upon or by reason of the indorsement," within the meaning of those words, as used in the Bills of Lading Act of 1855? It was considered by Brett M.R. and Baggallay L.J. that if the effect of the indorsement and deposit was (as they thought) to pass the whole legal title to the goods to the appellants as indorsees, leaving an equitable interest only in the shipper, it was a necessary consequence that "the property passed" to them within the meaning of the statute, and that the respondent, the shipowner, was entitled to recover under the statute in this action. They clearly used the words "legal" and "equitable" in that technical sense which they have acquired in English law.

I am not myself satisfied that this consequence is necessary; but I admit that there are difficulties in the way of the contrary view; as there are also difficulties (arising from the strong and unqualified language used by judges of great authority, from the time when *Lickbarrow* v. *Mason* (2) was decided downwards) in the way of the opinion that an indorsement and deposit of a bill of lading in a case like the present operates by way of pledge, and not as an assignment of the whole legal title to the goods. The facts here are simply an indorsement in blank and deposit of the bills of lading, so indorsed, by way of security for money advanced. There are no special circumstances, except that the indorsee never did obtain, and that it was never possible for him (in fact) to obtain, delivery of the goods.

I should not feel greatly embarrassed (if there were no other authority) by the mere terms in which the custom of merchants was found in *Lickbarrow* v. *Mason* (2); namely, that "bills of lading are after the shipment, and before the voyage performed, negotiable and transferable by the shipper's indorsement and delivery, ... and that by such indorsement and delivery *the property* in such goods is transferred." This, it may be said, is the language of the Bills of Lading Act. But I do not understand it as necessarily meaning more than that "the property"

(1) 7 App. Cas. 606. (2) 5 T. R. 683.

H. L. (E.) 1884 SEWELL v. BURDICK. Earl of Selborne, L.C.

which it might be the intent of the transaction to transfer, whether special or general, passes by such an indorsement, according to the custom of merchants. The finding must be reasonably understood; it cannot (for instance) mean that the property will be transferred when there is no consideration.

But, although the custom as found seems to me to be consistent with the view taken by Field J. and Bowen L.J. in the present case, I have more difficulty in saying that the language of Buller J. in the earlier stages of *Lickbarrow* v. *Mason* (1) is so. And, in some later cases, other great judges have not only followed, but have even gone beyond that language. The Court of Queen's Bench, in *In re Westzinthus* (2), held that a right of stoppage in transitu might be exercised against the interest remaining in the shipper subject to the security created by an indorsement and deposit of the bill of lading, but they did so on the ground, not that the shipper retained any *legal* title or interest, but that he had an equity of redemption, of which the form in which the question then arose enabled the Court to take notice. And, although it is true that in *Harris* v. *Birch* (3) the Court of Exchequer, then composed of Barons Parke, Alderson, Gurney, and Rolfe, decided a question of stamp duty upon the ground that an indorsement and deposit of a bill of lading by way of security operated as a pledge, and Coleridge J. in *Jenkyns* v. *Brown* (4) considered it to pass a special property only to the indorsee, leaving the general property in the shipper, and in *Meyerstein* v. *Barber* (5) all the judges of the Common Pleas and in the Exchequer Chamber concurred in that view,—yet, on the other hand, when *Meyerstein* v. *Barber* came to the House of Lords (where the judgments of those Courts were affirmed), Lord Hatherley and Lord Westbury used strong language of an opposite kind. Lord Hatherley said: "If anything could be supposed to be settled in mercantile law, I apprehend it would be this, that, when goods are at sea the parting with the bill of lading *is parting with the ownership of the goods;*" and afterwards, "I apprehend that it would shake the course of proceeding

(1) 1 Sm. L. C. 753, 8th ed.
(2) 5 B. & Ad. 817.
(3) 9 M. & W. 591.
(4) 14 Q. B. 502.
(5) Law Rep. 2 C. P. 38, 661.

between merchants, as sanctioned by decided cases, if we were to hold that the assignment of the bill of lading, the goods being at the time at sea, does not *pass the whole and complete ownership of the goods*, so that any person taking a subsequent bill of lading, be it the second or be it the third, must be content to submit to the loss which would arise from that state of facts." These words are hardly, if at all, qualified by the context, "so that," &c., although in a later sentence (as to which see the remarks of Lord Blackburn in 7 Appeal Cases page 604), the proposition is less absolute: "When the vessel is at sea, and the cargo has not yet arrived, the parting with the bill of lading is parting with that which is the symbol of property, and which *for the purpose of conveying a right and interest in* the property, is the property itself" (1).

Lord Westbury's language is similar, perhaps stronger: "No doubt" (he said) "the transfer of it" (the bill of lading) "for value *passes the absolute property in the goods.*" He quoted some words of Erle C.J. to which I shall afterwards refer, as having the same sense; he spoke of the first holder for value of the bill of lading as having "*the legal ownership of the goods*," "*the legal right in the property*," "both *the right of property and the right of possession* passing by a symbol, the bill of lading, which is at once both the symbol of the property and the evidence of the right of possession" (2).

To reconcile these expressions with those used in the same case by the judges of the Common Pleas and in the Exchequer Chamber is scarcely possible, and yet no dissent from the views of those learned judges was expressed in this House; on the contrary their reasoning, and especially that of Willes J., was referred to with apparent approval, particularly by Lord Hatherley and Lord Chelmsford. In such a conflict, not of decisions but of judicial phraseology, if not doctrines, it becomes important to remember that it is often dangerous to infer, even from very strong words, when used diverso intuitu, conclusions on other subjects which if they had been present to the minds of the speakers, might perhaps have led to their being more guarded or qualified. None of the cases to which I have referred arose upon

(1) Law Rep. 4 H. L. 325, 326. (2) Law Rep. 4 H. L. 335-37.

H. L. (E.) 1884 SEWELL v. BURDICK. Earl of Selborne, L.C.

the statute with which your Lordships have now to deal, they related, some to the right of stoppage in transitu, some to competing claims between holders for value of different parts of the same set of bills of lading. It may well be that, as against all such claims, and against parties setting up interests adverse to the title of the indorsee for value, such words as "the legal ownership," "the legal right," "the right of property in the goods," might be used, and the property which passed to the indorsee might be described as "absolute" in a sense substantially true, even though such property might, as between the indorsee receiving and the shipper depositing the bill of lading by way of security, be special only and not general; and though the most apt term for a scientific definition of the transaction as between the borrower and the lender, may be, not assignment or transfer, but pledge.

In such a state of authority it is important to see how the matter stands in principle.

In principle the custom of merchants as found in *Lickbarrow* v. *Mason* (1) seems to be as much applicable and available to pass a special property at law by the indorsement (when that is the intent of the transaction) as to pass the general property when the transaction is, e.g., one of sale. In principle also there seems to be nothing in the nature of a contract to give security by the delivery of a bill of lading indorsed in blank, which requires more in order to give it full effect, than a pledge accompanied by a power to obtain delivery of the goods when they arrive, and (if necessary) to realize them for the purpose of the security. Whether the indorsee when he takes delivery to himself may not be entitled to assume, and may not be held to assume towards the shipowner, the position of full proprietor, is a different question. But, so long at all events as the goods are in transitu, there seems to be no reason why the shipper's title should be displaced any further than the nature and intent of the transaction requires. This is not inconsistent with what was said by Erle C.J. in *Meyerstein* v. *Barber* (2), that "the indorsement and delivery of the bill of lading while the ship is at sea, operate exactly the same as the delivery of the goods themselves to the assignee after

(1) 5 T. R. 683. (2) Law Rep. 2 C. P. 45.

the ship's arrival would do." That learned judge cannot have meant that possession of the symbol is for every purpose the same thing as actual possession of the goods; what he did mean was, that the indorsement and delivery of the bill of lading by way of pledge (which he considered to be the effect of the transaction in that case) was equivalent, and not more than equivalent, to a delivery by way of pledge of the goods themselves. Lord Hardwicke (1) thought that there was a difference between an indorsement of a bill of lading in blank and a personal indorsement, and (for some purposes) I think there is much reason for that opinion. If, from a personal indorsement, the inference might properly be drawn that a title by assignment, as distinguished from pledge, was meant to pass to the indorsee, it would not, in my opinion, follow that the same inference ought to be drawn from an indorsement in blank. Part of the custom of merchants, found in *Lickbarrow* v. *Mason* (2), was that "indorsements of bills of lading in blank may be filled up by the person to whom they are delivered or transmitted, with words ordering the delivery of goods to be made to such person; and, according to the practice of merchants, the same when filled up have the same operation as if it had been done by the shipper." Whether it is or is not usual in practice to fill up the blank with any name before taking delivery, it is certainly not to be implied from the custom as thus found that the operation of the indorsement, while it remains in blank, is necessarily to all intents and purposes the same as if it were filled up with the holder's name. So long as it remains in blank it may pass from hand to hand by mere delivery, or it may be redelivered to the shipper without any new transfer or indorsement, which would not be the case if there were a personal indorsement. It would be strange if the Bills of Lading Act has made a person whose name has never been upon the bill of lading, and who (as between himself and the shipowner) has never acted upon it, liable to an action by the shipowner upon a contract to which he was not a party.

I am not however sure, that, for the decision of the present appeal, it is really necessary to rely, either upon any difference between a personal indorsement and one in blank, or upon the

(1) 1 Atk. 249. (2) 5 T. R. 683.

H. L. (E.) 1884 SEWELL v. BURDICK. Earl of Selborne, L.C.

distinction between such a form of security as (in English law) might be held to pass the whole legal title, and a simple pledge.

The statute with which your Lordships have now to deal is introduced by a preamble, the material part of which is, that "by the custom of merchants a bill of lading of goods being transferable by indorsement the property in the goods may thereby pass to the indorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property." The 1st section enacts, that "every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself." The 2nd section provides that "nothing herein contained shall prejudice or affect any right of stoppage in transitu, or any right to claim freight against the original shipper or owner, or any liability of the consignee or indorsee by reason or in consequence of his being such consignee or indorsee, or of his receipt of the goods by reason or in consequence of such consignment or indorsement." There is nothing else material in that Act.

The statute contemplates the passing of "the property in the goods" by the indorsement of the bill of lading, as a thing which may, or may not, happen, according to the nature and intent of the contract or dealing, for the purpose of which that indorsement is made; and it seems to provide for those cases only in which the property so passes, as to make it just and convenient that all rights of suit under the contract contained in the bill of lading should be "transferred to" the indorsee, and should *not* any longer "continue in the original shipper or owner." One test of the application of the statute may perhaps be, whether, according to the true intent and operation of the contract between the shipper and the indorsee, the shipper still retains any such proprietary right in the goods, as to make it just and reasonable that he should also retain rights of suit (the word is *suit*, not *action*)

against the shipowner, under the contract contained in the bill of lading. If he does, the statute can hardly be intended to take from him those rights, and transfer them to the indorsee. If they are not transferred to the indorsee, neither is the indorsee subjected to the shipper's liabilities.

It is very difficult to conceive that when the goods are still in transitu, when the substance of the contract is not sale and purchase, but borrowing and lending, and when the indorsement and deposit of the bill of lading is only by way of security for a loan, it can be the intention of either party thereby, without more, to divest the shipper of all proprietary right to the goods, and to take from him and transfer to the indorsee all rights of suit under the contract with the shipowner. That some proprietary right (his original right, subject only to the creditor's security) remains in him is indisputable. If that proposition needed illustration from authority it would be found in the cases of *Re Westzinthus* (1), *Spalding* v. *Ruding* (2), and *Kemp* v. *Falk* (3). Can it be that he is by the statute deprived of all remedies, legal and equitable, under the bill of lading, as long as it remains in the hands of the secured creditor? The creditor, in the ordinary course of things, will do nothing until the time for payment or delivery of the goods arrives. Can it then be material whether the proprietary right, thus remaining in the shipper while the goods are in transitu, is legal or equitable? The statute relates to a subject of general mercantile law, in which not Englishmen only but foreigners also may be, and often are, concerned. Foreign as well as British indorsements of bills of lading by way of security for advances (which may be made abroad, perhaps in countries not governed by English laws) are liable to be affected by it, whenever recourse must be had to British Courts. It seems to me to be inconceivable that the construction of the words "the property in the goods," in such a statute can have been intended to depend upon any such technical distinction as that made in English law (but by no means in the laws of all other countries in which the customs of merchants prevail) between legal and equitable titles.

It is to be observed further that the statute contemplates bene-

(1) 5 B. & Ad. 817. (2) 6 Beav. 376.
(3) 7 App. Cas. 573.

H. L. (E.) 1884 SEWELL v. BURDICK. Earl of Selborne, L.C.

ficium cum onere and not onus sine beneficio. It may be reasonable if the indorsee has the benefit (as he would if he were a purchaser out and out, or if under his title as indorsee of the bill of lading he obtained delivery of the goods to himself), that he should take it with its corresponding burden, quoad the shipowner. But it would be the reverse of reasonable to impose upon him such a burden, when he has neither entered into any contract of which it might be the natural result, nor (having taken a mere security) has obtained any benefit from it. This observation is fortified by the fact that the statute does not appear to distinguish between indorsements subsequent and those anterior to its enactment.

On the other hand it seems impossible to suppose the legislature to have passed this statute without some reference to the custom proved in *Lickbarrow* v. *Mason* (1), and to the law (whatever may be the true view of it) established on the same subject by later authorities in the English Courts. And if (as I think) it ought to be understood with some reference to that custom and to those authorities, I cannot persuade myself that its operation is altogether restricted to cases of out and out sale, or that an indorsee of a bill of lading by way of security, who converts his symbolical into real possession by obtaining delivery of the goods, ought never to derive any benefit from it. The authorities decided upon the statute itself appear to me to be most easily reconciled with its apparent objects, and with each other, by a view which, if hardly consistent with expressions to be found in some other cases, nevertheless seems to me to have a real and substantial foundation in reason and good sense; viz. that the indorsee by way of security, though not having "the property" passed to him absolutely and for all purposes by the mere indorsement and delivery of the bill of lading while the goods are at sea, has a title by means of which he is enabled to take the position of full proprietor upon himself, with its corresponding burdens, if he thinks fit; and that he actually does so as between himself and the shipowner, if and when he claims and takes delivery of the goods by virtue of that title.

The authorities decided upon the statute are *Fox* v. *Nott* (2),

(1) 5 T. R. 683. (2) 6 H. & N. 637.

Smurthwaite v. *Wilkins* (1), *The Figlia Maggiore* (2), and *The Freedom* (3). Another case, *Short* v. *Simpson* (4), was also cited during the argument at your Lordships' Bar.

In *Fox* v. *Nott* (A.D. 1861) (5) the only question determined was, that the shipowner retained his remedy by action against the shipper, after the indorsement of the bill of lading (a case provided for by the 2nd section): but some of the learned judges expressed opinions bearing upon the general construction of the statute. Pollock C.B. said, "The indorsee of the bill of lading may be sued under the statute, because *by taking the goods* he also takes the liability to the freight." Martin B. said, "The statute means an actual vesting of the property as by bargain and sale;" and Wilde B. said, "I agree with my Brother Martin that the Act applies only to an absolute transfer of the goods, and was never intended to deprive a person who made advances on the security of the bill of lading of the benefit of the original contract of the shipper to pay the freight."

In *Smurthwaite* v. *Wilkins* (A.D. 1862) (1) the indorsee of a bill of lading, who had indorsed it over to a third party, was held not to be liable to the shipowner. Erle C.J. said, "The contention on the part of the plaintiff is, that, the property in the goods passing to the defendants by the assignment of the bill of lading, under the Act, they are liable for the freight, although they never received the goods ... . The contention is, that the consignee or assignee shall always remain liable, like the consignor, although he has parted with all interest and property in the goods by assigning the bill of lading to a third party, before the arrival of the goods. The consequences which this would lead to are so monstrous, so manifestly unjust, that I should pause before I consented to adopt this construction of the Act of Parliament. The person who received the goods was always considered liable for the freight; but that was not by virtue of an original liability as a contracting party, but on a contract implied from his acceptance of the goods. Looking at the whole statute, it seems to me that the obvious meaning is, that the assignee *who receives the cargo*" (the italics are in the

(1) 11 C. B. (N.S.) 847.
(2) Law Rep. 2 A. & E. 106.
(3) Law Rep. 3 P. C. 594.
(4) Law Rep. 1 C. P. 248.
(5) 6 H. & N. 637.

H. L. (E.) 1884 SEWELL v. BURDICK. Earl of Selborne, L.C.

report) " shall have all the rights and liabilities of a contracting party; but that, if he passes on the bill of lading by indorsement to another, he passes on all the rights and liabilities which the bill of lading carries with it." Sir E. Vaughan Williams agreed. " Looking " (he said) " at the preamble, and at the general scope and intention of the statute, I can entertain no doubt that the view presented by my Lord is the true one;" and he explained the effect of " the general scope " of the Aet to be, " that, where the right of property *leaves* the party, the rights and liabilities under the contract leave him also." A case like the present, of a security on an indorsed bill of lading, not acted upon (and which, in fact, never could be acted upon) by taking delivery of the goods, but at the same time not transferred to any other person, differs (*in specie*) from that of a man who has transferred the bill of lading by indorsing it over to another. But I cannot see that it would be more reasonable to make the holder of such a security, which he has never realized, and never can realize, liable under the statute, than if he had parted with the bill of lading to somebody else.

The cases of *The Figlia Maggiore* (1) and *The Freedom* (2) were determined in the Court of Admiralty under another statute, which (as Dr. Lushington and his successor, in my opinion, rightly held) gave that Court jurisdiction when, and only when, there was, independently of that statute, a right of action or suit; and, in those particular cases, it appears to have been held, that there was no such right of action or suit, unless it was given by the Bills of Lading Act. In both of them the plaintiffs, indorsees by way of security of bills of lading, had claimed and obtained delivery of the goods, and then had brought actions against the shipowners for damages which they had sustained through breaches of the contracts contained in the bills of lading; and they were held entitled to recover. This was right if an indorsee under such circumstances may rightly be held entitled to the benefit of the statute, as having elected to complete his potential and inchoate title by taking possession of the goods, and so placing himself towards the shipowner in the position of proprietor. May it not be said that " the property *in the*

(1) Law Rep. 2 A. & E. 106. (2) Law Rep. 3 P. C. 594.

goods" then (if not before) "passes" to him "*by reason of* the indorsement"? The principle of the liability, which under some circumstances was held, even before the statute, to attach to the indorsee taking delivery, was regarded by Erle C.J. in *Smurthwaite* v. *Wilkins* (1) as elucidating the policy and the objects of the statute itself; and both he, and Pollock C.B. in *Fox* v. *Nott* (2), spoke of "taking the goods," and "receiving the cargo," as the test of its application. The authorities on that subject (*Jesson* v. *Solly* (3); *Stindt* v. *Roberts* (4); *Wegener* v. *Smith* (5); *Chappel* v. *Comfort* (6)) seem from this point of view to deserve consideration.

The decision in the Court of Admiralty in the case of *The Freedom* (7) was affirmed by Her Majesty in Council, upon the advice of the Judicial Committee, and although it was on a point as to which the Admiralty had only a statutory jurisdiction concurrent with the Courts of Common Law, and though in all English Admiralty cases the appeal now lies to this House, still this, as the decision of a Court of final appeal, ought not, in any later case, to be lightly departed from.

The case of *Short* v. *Simpson* (8) did not really require anything to be decided as to the effect of the statute, and nothing was in fact so decided. It was there held that, quocunque modo, whether under the statute or independently of the statute, the shipper, to whom a bill of lading which he had indorsed and delivered to his creditor by way of security was reindorsed and redelivered upon payment of the loan, was remitted to his original rights.

Upon the whole I cannot dissemble that this case appears to me to be attended with some considerable difficulties. But those difficulties are mainly technical, arising out of a comparison of the language of the statute with various and not always consistent forms of expression found in authorities not decided with a view to any such consequences as those which the statute would produce. They deal with questions between unpaid vendors of

(1) 11 C. B. (N.S.) 847.
(2) 6 H. & N. 637.
(3) 4 Taunt. 52.
(4) 17 L. J. (Q.B.) 166.
(5) 15 C. B. 285.
(6) 10 C. B. (N.S.) 802.
(7) Law Rep. 3 P. C. 594.
(8) Law Rep. 1 C. P. 248.

H. L. (E.) 1884 SEWELL v. BURDICK. Earl of Selborne, L.C.

goods comprised in bills of lading and bonâ fide indorsees of the same bills of lading for value, or between competing and adverse claimants to priority as bonâ fide holders for value of the bills of lading themselves. The statute, on the other hand, deals with questions between shippers and indorsees of bills of lading claiming under them, and between indorsees and shipowners. The preponderance of principle and reason appears to me to be against the proposition, that, as between those parties, it can have been intended by, or can be the effect of, the statute to make the creditor of the shipper liable (in effect) as his surety to the shipowner (with whom he was never brought in contact), by reason only of the deposit with him, by way of security, of a bill of lading indorsed in blank; his right under that deposit, being (whether at law or in equity) special and not general, and the shipper retaining (whether at law or in equity) the real and substantial property in the goods, subject to the security. It had not, until the present case, been directly or indirectly determined by any authority that such is the effect of the statute.

My conclusion is, that the appellants ought to be exonerated by your Lordships' judgment from the respondents' action; and that the order of the Court of Appeal ought to be reversed, with costs.

LORD BLACKBURN :—

My Lords, the judgment of Field J. was reversed by the order now under appeal. The case was tried before him without a jury, and I think it is necessary to see what he had to determine. There was no question between vendor and vendee, nor of stoppage in transitu, raised, for there was neither a vendor nor a stoppage. The law and decisions as to stoppage in transitu might be relevant in construing the statute 18 & 19 Vict. c. 111, but did not otherwise affect the rights of the parties.

It will be seen by reference to the statement of claim and of defence that it was not suggested that the defendants were, at the time the goods were shipped, in any way interested in the goods; nor that they were, either as undisclosed principals or otherwise, parties to the contract in the bill of lading until it was delivered to them, after the ship had sailed and the goods were

in the hands of the shipowners to be carried under the bill of lading and were not yet delivered, with an indorsement in blank by Nercessiantz, the consignee named in the bill of lading.

I do not think that, either at the trial or on the argument, it was at all disputed that at common law the remedy of the shipowner under a bill of lading was by enforcing his lien upon the goods, or by bringing an action on the contract against any one who, at the time when the goods were shipped, was a party to the bill of lading, either as being on the face of it a contracting party, or as being an undisclosed principal of such a party. In either of these cases he might be sued as having been from the beginning a party to the contract.

Some attempts had been made to say that the contract in a bill of lading might, under some circumstances at least, be transferred to an assignee in a manner analogous to that in which the contract in a bill of exchange was transferred by the indorsement of the bill of exchange; but I think since the decision in *Thompson* v. *Dominy* (1) in 1845, it has been undisputed law that under no circumstances could any one not a party to the contract from the beginning sue on it in his own name. Any action on the contract at common law must be brought in the name of an original contractor, and no action could be brought on the contract against one who was not liable to be sued as an original contractor.

But ten years later the 18 & 19 Vict. c. 111, was passed. The preamble states this as one of the objects which the legislature had in view, "Whereas by the custom of merchants a bill of lading being transferable by indorsement the property in the goods may thereby pass to the indorsee" (which I think for a long time before the 18 & 19 Vict. A.D. 1855 was undisputed), "but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner" (this, it is to my mind clear, refers to *Thompson* v. *Dominy*) (1), "and it is expedient that such rights should pass with the property."

The mode in which the legislature carry out the object thus expressed in the preamble is by sect. 1: "Every consignee of

(1) 14 M. & W. 403.

H. L. (E.) 1884 SEWELL v. BURDICK. Lord Blackburn.

goods named in a bill of lading, and every indorsee of a bill of lading, *to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement*, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself."

The case made on the statement of claim was that "the" property had passed upon or by reason of the indorsement to the defendants. Not that they were before that a party to the contract in the bill of lading, but that by virtue of the Act 18 & 19 Vict. when the property passed they became subject to the same liabilities as if the contract contained in the bill of lading had been made with themselves.

It is not disputed that the delivery of the bill of lading to the defendants with the indorsement of the consignee on it in blank was an indorsement, nor that whatever interest then passed to them still remained in them. What was in issue was whether upon or by reason of that indorsement "the" property passed.

The first and most important question to be decided in this case is, what is the true construction of 18 & 19 Vict. c. 111? Does "the property" in the goods there mean any legal property in the goods: so as to be satisfied by proof that a legal property passed accompanied by a right of possession so as to entitle the transferee to maintain trover, though it was intended by the parties, and was as between them, to be by way of security only, the transferor retaining a right of redemption either by way of a common law retention of the general property, though the pledgee had a right to the possession and a property as pledgee, a right exceeding a lien: or the whole property at law having passed by way of mortgage the transferor retaining an equity of redemption, which in 1855 was an equitable right, enforceable only in a Court of Equity?

I think that all the judges below were of opinion that if the right reserved was the general right to the property at law, what was transferred being only a pledge (conveying no doubt a right of property and an immediate right to the possession, so that the transferee would be entitled to bring an action at law against

anyone who wrongfully interfered with his right), though "*a*" property, and "a" property against the indorser, passed "upon and by reason of the indorsement," yet *the* property did not pass. And I agree with them. I do not at all proceed on the ground that this being an indorsement in blank followed by a delivery of the bill of lading so indorsed, had any different effect from what would have been the effect if it had been an indorsement to the appellants by name.

The case of *The Freedom* (1) was cited, and I think there are expressions used in the judgment delivered in that case by Sir Joseph Napier which indicate that the Judicial Committee were not of that opinion. It is said (page 599), "The plaintiffs were consignees for sale; but as part of the transaction a bill of exchange was drawn by the consignors for nearly the full value of the goods, the bills of lading were indorsed by them and forwarded to the plaintiffs, by whom the draft of the consignors was accepted and paid in due course." If that was the transaction (and whether it was so or not, the Judicial Committee proceeded on the assumption that such was the transaction), the plaintiffs in *The Freedom* (1) were in exactly the position of Church, in the case of *Newsom* v. *Thornton* (2), the case to which I shall have to refer afterwards. Church had the bill of lading indorsed to him as a factor, or consignee for sale, and had therefore a right to hold the goods as against the indorser as a security for all his advances, and he had authority at common law to sell the goods, and before the arrival of the ship to transfer the bill of lading in furtherance of a sale, but he had no authority to pledge either the goods or the bill of lading. It is true that by the Factors' Acts the plaintiffs in *The Freedom* (1) would have had a power, which Church had not, to pledge the bill of lading, but as they did not exercise that power it could make no difference.

The judgment then proceeds: "The legal title to the property in the goods specified in the bills of lading was thus transferred to and vested in the plaintiffs; the right of suing upon the contract in the bills of lading was transferred to them by force of the statute 18 & 19 Vict. c. 111." The judgment then proceeds to shew, I think correctly, that the dictum of Martin B., reported in

(1) Law Rep. 3 P. C. 594. (2) 6 East, 17.

H. L. (E.) 1884 SEWELL v. BURDICK. Lord Blackburn.

Fox v. *Nott* (1), was not necessary for the decision in *Fox* v. *Nott*, and goes on: "Their Lordships are satisfied that it was intended by this Act that the right of suing upon the contract under a bill of lading should follow the property in the goods therein specified; that is to say, *the legal title to the goods as against the indorser*." It certainly seems to me that their Lordships thought that "the" property passed within the meaning of 18 & 19 Vict. c. 111, if any legal right to hold as against the indorser passed.

The statute which their Lordships had to construe was the 24 Vict. c. 10 s. 6, which is in these terms, "The High Court of Admiralty shall have jurisdiction over any claim by the owner" (i.e. of the goods) "or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shewn to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales." It is not necessary to put a construction on 24 Vict. c. 10 s. 6.

I think that there are very good reasons for contending that a person who has possession of an indorsed bill of lading without any right at all to hold it against the indorser, without being owner of any interest in the goods, is not an "assignee" within the meaning of this enactment, and consequently that what I understand to be the actual decision of Dr. Lushington in *The St. Cloud* (2), that such a person could not sue under the Admiralty Act, may have been right enough. It is not necessary to decide that. But I agree with what was said in *The Nepoter* (3), that it is contrary to all rules of construction to interpolate any reference to the Bill of Lading Act into the Admiralty Act. I think, therefore that the actual point decided in *The Freedom* (4) might be quite right, for the plaintiff in that action had *a* property, and a very substantial property, in the goods, as against the indorsers, and every one else, and was in every sense an assignee of the

(1) 6 H. & N. 637.
(2) Brow. & Lush. 4.
(3) Law Rep. 2 A. & E. 376.
(4) Law Rep. 3 P. C. 594.

bill of lading. The opinion expressed on the construction of the 18 & 19 Vict. c. 111, that in that Act the property meant a legal title as against the indorser, was perhaps unnecessary, and, I think, not sound.

The words used in the statute are not such as primâ facie to express such an intention. No one, in ordinary language, would say that when goods are pawned, or money is raised by mortgage on an estate, the property, either in the goods or land, passes to the pledgee or mortgagee, and I cannot think that the object of the enactment was to enact that no security for a loan should be taken on the transfer of bills of lading unless the lender incurred all the liabilities of his borrower on the contract. That would greatly, and I think unnecessarily, hamper the business of advancing money on such securities which the legislature has, by the Factors Acts, shewn it thinks ought rather to be encouraged.

It is not uncommon to reduce into writing the agreement between the banker and his customers as to the terms on which the bills of lading deposited by them as securities are to be held. Such was the case in *Glyn* v. *East and West India Dock Company* (1), as to which I shall have more to say hereafter.

When there is such a writing, it is, in the absence of fraud, conclusive as between the parties as to what they intended. And I do not in the least question that such a writing may be so expressed as to shew that between the parties the transfer was a mortgage, though of goods, in the manner with which everyone is familiar with regard to lands. The equity of redemption in such a case was an equitable estate only, and in 1855 enforceable in equity, not at law.

Where there is neither a symbolical delivery by a transfer of a bill of lading, nor an actual delivery of the goods themselves, there may be (though there seldom is) a substantial difference in the rights of the lender according as the transaction is of the one kind or the other.

In *Howes* v. *Ball* (2) Ball sold and delivered a coach to John Howes (since deceased) under an agreement in writing, in which there was this clause, "And further I, John Howes, do agree that Thomas Ball do have and hold a claim upon the coach until the

(1) 5 Q. B. D. 129; 6 Q. B. D. 475; 7 App. Cas. 591. (2) 7 B. & C. 481.

H. L. (E.) 1884 SEWELL v. BURDICK. Lord Blackburn.

debt be duly paid." John Howes died without having paid the debt. Ball, after his death, seized the coach, for which seizure the action was brought by the executor. Had that agreement amounted to a mortgage by John Howes to Ball, I take it there could have been no doubt that the mortgagee would have had as much right against the executor of John Howes as he would have had against John Howes himself. But it was held that it did not amount to a mortgage, but only to an agreement that Ball should have a right of hypothec, and, there having been no delivery by Howes to Ball, the decision was that though so long as John Howes lived and held the property in the coach Ball might have justified the seizure, as against him, he could not justify a seizure as against the representatives.

In *Flory* v. *Denny* (1) where the agreement was "as an additional security for a loan to assign all the debtor's right and interest in a chattel," it was held to be a mortgage, and to operate so as to transfer the property, without any delivery, as a bargain and sale out and out of the goods would, though an agreement to create a pledge would, according to *Howes* v. *Ball* (2), have conveyed no property of any kind in the goods without a delivery.

But where the goods are at sea, and there is a transfer of the bill of lading, there is a delivery of possession, symbolical, it is true, but all that can be given. The question whether there was a mortgage or only a common law pledge, or hypothec, it being accompanied by delivery, might affect the question what was the Court in which those rights were to be enforced, but does not affect the substance of the rights. The borrower if ready and willing to pay the money, might in the one case be able to bring an action at law against the lender who refused to allow him to redeem, and in the other have to sue in equity, but as it would equally be a pledge his rights would be the same in substance. I am therefore strongly inclined to hold that even if this was a mortgage there would not have been a transfer of "the" property within the meaning of 18 & 19 Vict. c. 111. This is contrary to the opinions not only of Brett M.R. and Baggallay L.J., but of Field J. also.

(1) 7 Ex. 581. (2) 7 B. & C. 481.

Bowen L.J. who agreed with Field J. in thinking that this was not a mortgage but only a pledge, did not express any opinion as to what would have been the law if it had been a mortgage. I believe all the noble and learned Lords who heard the argument are agreed with him in thinking that in this case it was only a pledge. I do not therefore intend to express a final decision that an assignee of a bill of lading by way of mortgage is not as such liable to be sued under 18 & 19 Vict. c. 111; but only to guard against its being supposed that even if Brett M.R. and Baggallay L.J. were right in holding this a mortgage, I, as at present advised, should agree in their conclusion that the defendants could be sued.

I now proceed to consider the question on which the Court of Appeal were divided in opinion, but the majority made the order now appealed against. The question is stated by Brett M.R. to be, "Does the indorsement of a bill of lading as a security for an advance, by a necessary implication which cannot be disproved, pass the legal property in the goods named in the bill of lading to the indorsee with an equity in the indorser, the borrower, to redeem the bill of lading by payment, or to receive the balance, if any, on a sale?" (1)

Field J. had held, and Bowen L.J. agreed with him, that it might so operate, if so intended by the parties at the time, but did not so operate if it was intended to be no more than a pledge as distinguished from a mortgage.

I do not understand that any one of the judges below disputed that if it was a question of intention depending on the evidence, the finding of Field J. was right; but the majority in the Court of Appeal proceeded on the principles laid down by Brett L.J. in *Glyn* v. *East and West India Dock Company* (2). In that case the terms on which the bill of lading was delivered to Glyn & Co. were reduced to writing, and the question therefore whether it was intended to deliver it by way of pledge only, or by way of a mortgage, depended on the construction of that writing. Whether Brett L.J. thought that on the construction of the written instrument it was intended to be a mortgage I do not know; I do not think he proceeded on that ground. He said it was a mortgage,

(1) 13 Q. B. D. 161. (2) 6 Q. B. D. 475.

H. L. (E.) 1884 SEWELL v. BURDICK. Lord Blackburn.

and that the effect of the statute 18 & 19 Vict. c. 111 was to transfer the right to sue and the liability to be sued to Glyn & Co.

Lord Bramwell, then Bramwell L.J., was of an opposite opinion on both points. He thought that Glyn & Co. had a special property and a right of possession and no more.

In the House of Lords I said, "I do not think it necessary to express any opinion on a question much discussed by Brett L.J., I mean whether the property which the bankers were to have was the whole legal property in the goods, Cottam & Co.'s interest being equitable only, or whether the bankers were only to have a special property as pawnees, Cottam & Co. having the legal general property. Either way the bankers had a legal property, and at law the right to the possession, subject to the shipowner's lien, and were entitled to maintain an action against anyone who, without justification or legal excuse, deprived them of that right" (1). All the noble and learned Lords agreed in this. I think therefore the decision of this House is a strong authority in support of the position which I have before advanced, that the rights of a mortgagee having taken a bill of lading, and the rights of a pawnee having taken a bill of lading, are in substance the same.

I did not think it necessary to point out that the question which the House in *Glyn* v. *East and West India Dock Company* (1) had to decide, and did decide, would have been just the same if 18 & 19 Vict. c. 111 had never been passed or had been repealed, and consequently that it was unnecessary to express any opinion on the construction of that Act, but it obviously was so.

Before proceeding further I wish to point out what in my opinion is a great misapprehension as to the effect of the decision of this House in *Lickbarrow* v. *Mason* (2), and as to the weight to be given to the opinion of Buller J. delivered in this House and reported in a note to 6 East.

I have already said that in this case there is no sale, no vendor, and no vendee, and no stoppage in transitu, so that this misapprehension, as I think it is, is not so material as it might be in some other cases.

(1) 7 App. Cas. 591, 606. (2) 6 East, 20, n.

A demurrer on evidence, as is pointed out by Eyre C.J. in delivering the unanimous opinion of the judges in *Gibson* v. *Hunter* (1), not *Gibson* v. *Minet*, as is by mistake said in the note in 6 East, though not familiar in practice, was a proceeding known to the law. He explains it, and states his very confident expectations (which have been justified by the result) that no demurrer on evidence would again be brought before the House.

It may be well to point out the dates. The demurrer to evidence in *Lickbarrow* v. *Mason* (2) was in 1787. The only case of a demurrer on evidence in what were then recent times, was *Cocksedge* v. *Fanshawe* (3), on which judgment had been given in this House in 1783. Neither in the King's Bench nor in the Exchequer Chamber was any question raised in *Lickbarrow* v. *Mason* (2) as to the mode in which the questions discussed were raised. In 1790 the writ of error from the decision of the Exchequer Chamber was brought before the House of Lords. The law peers at that time were Lord Thurlow, Lord Loughborough, and Lord Kenyon. When it was argued does not appear, but it was argued, and the same question as had been asked of the judges in *Cocksedge* v. *Fanshawe* (3) was asked of the judges. Six judges (including all the survivors of those who had joined in Lord Loughborough's judgment in the Exchequer Chamber) answered in favour of the respondent. The three judges who had given judgment in the King's Bench answered in favour of the appellant. This House delayed giving its opinion till 1793. In the meantime, in 1791, there was a demurrer to evidence in *Gibson* v. *Hunter* (1), which was brought before this House. The case in this House is reported, 2 H. Bl. 187. On the 7th of February 1793 this House gave judgment, awarding a venire de novo. One week afterwards, on the 14th of February 1793, this House delivered judgment in the long pending case of *Lickbarrow* v. *Mason* (2), awarding in that case also a venire de novo. Lord Loughborough was himself at that time Lord Chancellor.

I should have thought, if anything was clear, it was that this House did not decide anything, except that on that demurrer to

(1) 2 H. Bl. 205, 206. (2) 5 T. R. 683.
(3) 1 Doug. 118, 134.

H. L. (E.) 1884 SEWELL v. BURDICK. Lord Blackburn.

the evidence no judgment could be given; certainly the last conclusion that I should draw is that stated by Field J., that the House in which Lord Loughborough was Chancellor decided "presumably" on the opinion delivered by Buller J. against the judgment of Lord Loughborough, which six judges to three had thought right. Neither can I at all agree in the opinion expressed by Field J. that the opinion of Buller J. has always been taken as the law, and been adopted and followed as the law up to the present day. It never was published till 1805 in a note to 6 East 20. I have for many years been of opinion, and still remain of opinion, that much of what Buller J. expresses in that opinion as to stoppage in transitu was peculiar to himself, and was never adopted by any other judge, and is not law at the present day. But it is not necessary to pursue the subject further, as I agree with Bowen L.J. that neither the statement of the custom of merchants in the special verdict in *Lickbarrow* v. *Mason* (1), nor the opinion of Buller J., justifies the inference that the indorsement of a bill of lading for a valuable consideration must pass the entire legal property, whatever was the intention of the parties.

In *Lickbarrow* v. *Mason* (1) Turing was an unpaid vendor to Freeman. He had indorsed the bill of lading to Freeman, and had not therefore any right, except that of stopping the goods whilst in transitu if Freeman became insolvent without having paid for the goods, and that right he had, though the indorsed bill of lading had been sent on to the vendee, so long as that bill of lading remained in the vendee's hands. But before any such stoppage Freeman, for valuable consideration, indorsed the bill of lading to Lickbarrow, who, whether as mortgagee or pledgee, had a legal property accompanied by a right of possession. The point which I understand to have been decided in *Lickbarrow* v. *Mason* (1) was, that on the transfer of the bill of lading to Lickbarrow the goods ceased to be in transitu, the shipowner from that time no longer holding them as a middleman to carry the goods from the unpaid vendor, Turing, to Freeman his vendee, but holding them as agent for Lickbarrow. It was held, first in *Re Westzinthus* (2) and then in *Spalding* v. *Ruding* (3), that where

(1) 5 T. R. 683. (2) 5 B. & Ad. 817. (3) 6 Beav. 381.

the transitus was thus put an end to by what was in reality only a pledge, the stoppage might be made available in equity so far as the rights of the pledgee did not extend. I thought, and still think, that the reason why the stoppage could not be made available at law was because the shipowner no longer held the goods as a middleman, as the transferee of the bill of lading for valuable consideration and bonâ fide so as to give him a security whether by way of mortgage or by way of pledge, had a legal property in the goods which he could enforce as against the shipowner. Such being my view of the law, whether it was right or wrong, I expressed myself accordingly in *Kemp* v. *Falk* (1), so as to shew that I thought so; but there was nothing in that case to call for a decision on the point now before this House.

In *Newsom* v. *Thornton* (2) Lord Ellenborough says: "I should be very sorry if anything fell from the Court which weakened the authority of *Lickbarrow* v. *Mason* (3) as to the right of a vendee to pass the property of goods in transitu by indorsement of the bill of lading to a bonâ fide holder for a valuable consideration and without notice. For as to *Wright* v. *Campbell* (4), though that was the case of an indorsement of a factor, it was an outright assignment of the property for value. Scott, the indorsee, was to sell the goods and indemnify himself out of the produce the amount of the debt for which he had made himself answerable. The factor, at least, purported to make a sale of the goods transferred by the bill of lading, and not a pledge. Now this was a direct pledge of the bill of lading, and not intended by the parties as a sale. A bill of lading, indeed, shall pass the property upon a bonâ fide indorsement and delivery where it is intended so to operate, in the same manner as a direct delivery of the goods themselves would do if so intended. But it cannot operate further."

Lawrence J., at page 43, says, speaking of *Lickbarrow* v. *Mason* (3), "All that that case seems to have decided is, that where the property in the goods passed to a vendee, subject only to be devested by the vendor's right to stop them while in transitu,

(1) 7 App. Cas. 573.
(2) 6 East, 40.
(3) 5 T. R. 683.
(4) 4 Burr. 2047.

H. L. (E.) 1884 SEWELL v. BURDICK. Lord Blackburn.

such right must be exercised, if at all, before the vendee has parted with the property to another for a valuable consideration and bonâ fide, and by indorsement of the bill of lading given him a right to recover them." And Le Blanc J. says that what they then determine "will not break in at all on the doctrine of *Lickbarrow* v. *Mason* (1) that the indorsement of a bill of lading upon the sale of the goods will pass the property to a bonâ fide indorsee, the property being intended to pass by such indorsement."

In *Glyn* v. *East and West India Dock Co.* (2), Brett L.J. says (speaking of an opinion of Willes J.), "To say that an indorsement of a bill of lading for an advance is only a pledge, seems to me to be inconsistent with what *has always been considered* to be the result of *Lickbarrow* v. *Mason* (1), namely, that such an indorsement passes the legal property," by which I understand him to mean the whole legal property. But neither in that case nor in the case now at bar does he refer to any authority to that effect. Expressions used by judges have been cited which, I think, only shew that they did not carefully consider their language, where no question of the kind before us was under discussion. And, as far as I know, there is no decision subsequent to *Lickbarrow* v. *Mason* (1) which proceeds on such a ground, whilst *Newsom* v. *Thornton* (3) proceeds expressly on the ground that the indorsement of a bill of lading, when intended to be a pledge only, is not valid if made by one who has no authority to make a pledge. I do not know that I am justified in saying that it is a decision that, if it was made by one who had authority to make a pledge, it would be good as such, though I think that appears to have been Lord Ellenborough's opinion, and I do not think any authority was cited on the argument at the bar to shew that such is not the law. No case was cited at the bar, nor am I aware of any in which it has been held that a transfer of the bill of lading for value necessarily, whatever might be the intention, passed the whole legal property. The Master of the Rolls says:—"If the general understanding of merchants had not been in accordance with the verdict of the jury in *Lickbarrow* v. *Mason* (4), accepted in its largest sense, there would, one would think, have been cases

(1) 5 T. R. 683.
(2) 6 Q. B. D. 480.
(3) 6 East, 17.
(4) 1 Sm. L. C. 753, 8th ed.

in the books raising the question" (1). With submission to the Master of the Rolls, I think no weight can be given to this absence of authority until it is shewn that there have been cases in which it became material to consider whether an indorsement intended to be and operating as a pledge at law had a less effect than an indorsement operating against the intention as a mortgage. I have already given my reasons for thinking that in substance the rights would be the same. Without, therefore, deciding the question whether a mortgage would render the mortgagee liable under 18 & 19 Vict. c. 111, I decide that, mainly for the reasons given by Bowen L.J., this transfer did not operate as a mortgage.

I therefore am clearly of opinion that the order made by the Court of Appeal should be reversed with costs, and the judgment of Field J. restored.

LORD BRAMWELL:—

My Lords, I concur. This action would not have been maintainable at common law. Is it maintainable under 18 & 19 Vict. c. 111? That depends upon whether the appellants are indorsees of the bill of lading "to whom the property in the goods therein mentioned has passed upon or by reason of such indorsement." It is found as a fact, and rightly found, as is admitted, that all that was intended in the transaction was a pledge. This would give the appellants *a* property, but, as put by Bowen L.J., not "*the*" property. As I understand the Master of the Rolls, if this *could* be, then the appellants are right; but he thinks it could not be—that *Lickbarrow* v. *Mason* (2), or rather the opinion of Buller J., shews that when a bill of lading is indorsed to give any title to the transferee the entire property is passed, and that in such a case as this nothing but an equitable right to redeem remains in the transferor. It is for those who assert this to prove it. I cannot prove the negative that it is not so: and logically and reasonably I might content myself with saying that it is not proved to me: that I see no reason and no authority in support of it. But I go further: I think that authority and reason are against it. The cases do not, in my opinion, justify the conten-

(1) 13 Q. B. D. 162. (2) 1 Sm. L. C. 753, 8th ed.

H. L. (E.) 1884 SEWELL v. BURDICK. Lord Bramwell.

tion. I will not discuss or examine them in detail; that has been done by the Lord Chancellor. I understand his conclusion to be that the expressions of learned judges which have been relied upon should be read and interpreted secundum subjectam materiam. I agree. In no case has the present matter been under consideration. As to the reason and principle which should govern, I ask why should the transfer of the bill of lading have a greater effect, contrary to the parties' intention, than the handing over of the chattels themselves? They could be pledged if on shore, but being at sea no actual delivery, which is necessary to a common law pledge, can take place. There can, however, be a symbolical delivery by transferring the bill of lading. Why should the effect be different?

Then consider the inconvenience of holding that the pledgor has only an equitable right: that he may repay the loan at the day appointed, but thereby acquire no legal title to the possession of the goods: that the pledgee may sell and pass the entire property to one not having notice of the equitable title. Consider what difficulties would be put on those who lend on such securities if this action was maintainable. The banker who lent money on a bill of lading for goods which arrived in specie, but damaged by perils of the seas so as to be worthless, might lose the money lent and the freight. Another consequence would be that the transferee of the bill of lading, though only interested to the amount of the loan on it, would be the person to bring actions on the contract to carry. It is true that unless he can do so in all cases, he can in none, even where his interest is to the extent of the full value of the goods. Either this was not thought of by the legislature, or, if it was, they thought that no case could be included unless all were, and that it was better to include none than all. It is to be observed that the statute in its preamble says that by indorsement the property "*may*" pass. It is to be remembered also, as pointed out by my Lord Chancellor, that this law bears upon foreigners out of the kingdom.

I am the more surprised at this contention on the part of the Master of the Rolls, as he has always so ably and powerfully contended that mercantile laws, contracts, and usages should be free as possible from technicality. I am of opinion that the appeal

should be allowed. I cannot truly say that I have any doubt on the matter.

I take this opportunity of saying that I think there is some inaccuracy of expression in the statute, It recites that, "by the custom of merchants a bill of lading being transferable by indorsement the property in the goods may thereby pass to the indorsee." Now the truth is that the property does not pass by the indorsement, but by the contract in pursuance of which the indorsement is made. If a cargo afloat is sold, the property would pass to the vendee, even though the bill of lading was not indorsed. I do not say that the vendor might not retain a lien, nor that the non-indorsement and non-handing over of the bill of lading would not have certain other consequences. My concern is to shew that the *property* passes by the contract. So if the contract was one of security—what would be a pledge if the property was handed over—a contract of hypothecation, the property would be bound by the contract, at least as to all who had notice of it, though the bill of lading was not handed over.

There is, I think, another inaccuracy in the statute, which indeed is universal. It speaks of the contract contained in the bill of lading. To my mind there is no contract in it. It is a receipt for the goods, stating the terms on which they were delivered to and received by the ship, and therefore excellent evidence of those terms, but it is not a contract. That has been made before the bill of lading was given. Take for instance goods shipped under a charterparty, and a bill of lading differing from the charterparty; as between shipowner and shipper at least the charterparty is binding: *Gledstanes* v. *Allen* (1).

These distinctions are of a verbal character, and not perhaps of much consequence; but I am strongly of opinion that precision of expression is very desirable, and had it existed in such cases as the present there would not have been the contradictory opinions which have been given.

LORD FITZGERALD:—

My Lords, Field J. in the Court below came to the conclusion that the transaction under investigation was intended by the

(1) 12 C. B. 202.

H. L. (E.) 1884 SEWELL v. BURDICK. Lord FitzGerald.

parties to operate as a pledge only. There can be no doubt that the inference thus drawn by the learned judge was correct in fact. It seems to follow that the pledgees acquired a special property in the goods with a right to take actual possession, should it be necessary to do so for their protection or for the realisation of their security. They acquired no more, and subject thereto the general property remained in the pledgor.

I am of opinion that the delivery of the indorsed bill of lading to the defendants as a security for their advance did not by necessary implication transfer *the* property in the goods to the defendants. They were not therefore "indorsees of a bill of lading to whom *the* property in the goods passed by reason of the indorsement," so as to make them without more "subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with them."

The judgments which have been just delivered are so very full, and so able and satisfactory, that it would be mere affectation on my part to attempt to do more than express my concurrence.

Order appealed from reversed. Order of Field J. restored. Respondent to pay the costs in the Court below and in this House. Cause remitted to the Queen's Bench Division.

Lords Journals 5th December 1884.

Solicitors for appellants: *Hare & Co., for H. J. Leach, Manchester.*

Solicitors for respondent: *Lowless & Co.*

[HOUSE OF LORDS.]

ANDERSON TRITTON & Co. . . . . APPELLANTS;

AND

THE OCEAN STEAMSHIP COMPANY . . RESPONDENTS.

H. L. (E.)
1884
Dec. 5.

Ship—General Average Loss—Liability of Cargo Owner for General Average Contribution.

When ship and cargo are in peril, the fact that the shipowners have by the act of the master become bound to pay and have paid a sum of money for preservation of ship and cargo, and that the master in so binding them pursued a reasonable course under the circumstances, is not conclusive that the whole sum was chargeable to general average so as to bind the cargo owners to pay their proportion.

The decision of the Court of Appeal reversed and a new trial ordered on the ground that the question of the amount chargeable to general average ought to have been submitted to the jury.

APPEAL from an order of the Court of Appeal.

The facts proved at the trial of the action are set out at length in the report of the decision below (1).

For the purposes of the present report the following brief statement will suffice.

On the 2nd of June 1880 the respondents' ship *Achilles* grounded on a sandbank on the river Yangtsze. After some time the master signalled to the *Shanghai*, which vessel passed a hawser to the *Achilles* and towed her, and eventually the *Achilles* came off the bank. On the 6th of June an agreement was drawn up between and signed by the master of the *Achilles* on behalf of his ship and owners, and the master of the *Shanghai* on behalf of his ship and owners. The agreement was on a printed form, and was dated the 2nd of June, and framed as if the *Achilles* were still on the bank. It bound the master of the *Shanghai* to use his best endeavours to get the *Achilles* off by towing; the towage service not to exceed twenty-four hours, after which the *Shanghai* was to be at liberty to leave the *Achilles* whether afloat or not; if the *Achilles* was towed off in less than twenty-four hours the towage

(1) 13 Q. B. D. 651.

H. L. (E.) 1884 ANDERSON v. OCEAN STEAMSHIP COMPANY.

service to be considered complete; it bound the master of the *Achilles* whether towed off or not to pay the master of the *Shanghai* 10,000 taels and to pay for all damage to the *Shanghai* her tackle, &c. There was evidence that the *Shanghai* never assisted for a less sum. A long correspondence ensued between the respondents as owners of the *Achilles* and the owners of the *Shanghai*, and eventually the respondents paid the owners of the *Shanghai* £2691 19*s.* 6*d.*, consisting of the 10,000 taels and further sums for commission and repairs to the *Shanghai*.

The respondents claimed to treat this as a general average loss and brought an action against the appellants as owners of part of the cargo in the *Achilles* to recover £162 11*s.* 7*d.* as their general average contribution, their proportion having been estimated at that sum by a general average adjuster. The appellants denied that there had been a general average loss, and denied their liability for the amount claimed, or for any amount. Further, they paid into Court £75 as enough to satisfy the plaintiffs' claim (if any) for general average.

At the trial the following questions were put by Cave J. to the jury; viz., 1. Did the master of the *Achilles* by his act make his owners liable to pay the 10,000 taels, or in other words did he signal the *Shanghai* to his assistance knowing her terms? 2. Was that a reasonable course for him to pursue under the circumstances? 3. Was the commission charged a reasonable commission? 4. Were the repairs charged for and done to the *Shanghai* reasonable?

The jury answered the above questions in the affirmative, and under the direction of the learned judge found a verdict for the plaintiffs for the amount claimed, less the amount paid into Court, and Cave J. gave judgment for that amount.

The Queen's Bench Division (Grove, Lopes and Mathew JJ.) set aside the judgment for the plaintiffs and entered judgment for the defendants on the ground that there was no reasonable evidence for the jury of the agreement upon which the claim was based. The Court of Appeal (Brett M.R. Baggallay and Bowen L.JJ.) on the 21st of December 1883 made an order reversing that decision and entering judgment for the plaintiffs (1).

(1) 13 Q. B. D. 651.

From this order the defendants appealed.

Nov. 14, 17, 18. Sir *F. Herschell* S.G. and *Cohen* Q.C. (*J. Gorell Barnes* with them) for the appellants :—

The judgment of the Court of Appeal was wrong. The respondents were not obliged or compellable to pay the 10,000 taels for the services. The *Achilles* was no doubt in danger, and for the services rendered the *Shanghai* would be entitled to a quantum meruit. But they were rendered under circumstances shewing that there was no agreement to pay the 10,000 taels. The alleged consideration for this agreement could not have been enforced against the *Shanghai*, that is, the remaining for twenty-four hours to assist. Therefore the agreement was invalid. These were not "salvage services," the essence of a salvage service being that the salvor gets nothing if he does not salve, and a large sum if he does. This agreement is for a very different thing, for services at the most for twenty-four hours only, though the ship might at the end of that time be in extreme danger; the 10,000 taels were to be paid, however short or slight the services might be. Such an agreement cannot bind cargo owners, who were not consulted as to the payment. The jury have not found a contract; only the state of mind on the part of the captain. The *Achilles* could not have brought an action for breach of contract. If the *Shanghai* had sued in the Admiralty Court for salvage on a quantum meruit the *Achilles* could not have defended on the ground that the quantum meruit was ousted by the agreement. If there was no agreement in fact, the shipowners were not bound. If there was an agreement in fact it did not bind the cargo owners; for 1. It was not a salvage agreement, payment being due in any event; 2. It was unreasonable; 3. The shipowners would not have been compelled to pay.

Such an agreement is against public policy and if binding on the ship could not bind cargo. It would not be treated as binding in the Admiralty Court which has always given protection against exorbitant demands, even when agreed to, and in estimating the amount takes into consideration all the circumstances of the case: *The Hector* (1) per Sir J. Nicholl; *The Clifton* (2); *The*

(1) 3 Hagg. Adm. 95. (2) 3 Hagg. Adm. 120.

H. L. (E.) 1884 ANDERSON v. OCEAN STEAMSHIP COMPANY.

Glenduror (1) per James L.J.; *The Medina* (2); *The Waverley* (3). A salvor is entitled to a lien on the goods salved for his remuneration: Abbott on Shipping, 12th ed. Salvage, Part vi. ch. 2. p. 537; but he has no right to sue for remuneration except in the Admiralty Court. *Nicholson* v. *Chapman* (4) and *Newman* v. *Walters* (5) were not really cases of salvage though so treated. The shipowners having paid the whole when they might have got off for less, cannot charge any part on the cargo owners; and if the latter escape liability altogether in consequence, that is the fault of the shipowners who had no power to bind the cargo owners.

H. Matthews Q.C. and *G. Bruce* Q.C. (*H. D. Greene* with them) for the respondents, were requested to confine their arguments to the points: 1. Whether the agreement was against public policy? 2. Whether it was, under the circumstances, binding on the cargo owners? 3. Whether it was reasonable?

The agreement was binding on the shipowners, and, if so, payment under the compulsion of the agreement was the same thing as if the money had been paid down at the time, and gave rise to a general average contribution. The test is, was it judicious to make the sacrifice at the time? The agreement in fact bound the owners: *Arthur* v. *Barton* (6); *Beldon* v. *Campbell* (7). A reasonable necessity existed in this case, and the sum paid was not in fact unreasonable under the circumstances, as appears from the evidence. Whether an expenditure gives rise to a general average contribution depends upon whether it was judicious or not: *Birkley* v. *Presgrave* (8); *Kemp* v. *Halliday* (9) per Blackburn J., affirmed in the Exchequer Chamber: *Moran* v. *Jones* (10).

[LORD BLACKBURN:—The point is, was the case properly left to the jury? and have they found that the payment was reasonable as against the cargo owners?]

(1) Law Rep. 3 P. C. 592.
(2) 1 P. D. 272; 2 P. D. 5.
(3) Law Rep. 3 A. & E. 369.
(4) 2 H. Bl. 257.
(5) 3 B. & P. 612.
(6) 6 M. & W. 138.
(7) 6 Ex. 886.
(8) 1 East, 220.
(9) 6 B. & S. 723; Law Rep. 1 Q. B. 520.
(10) 7 E. & B. 523.

In finding it reasonable as to the ship, they have found it reasonable as against all parties. The *Shanghai* was herself in danger, and incurred loss. As to what is a reasonable amount to pay in such a case: see *The Waverley* (1); *The Minnehaha* (2); *The Medina* (3). The cargo owners are bound if the agreement was reasonable and proper; for, if so, it was a sacrifice for the general good. No doubt if the *Shanghai* had towed for twenty-four hours without result it would not have been a general average loss; but here the service has benefited ship and cargo, and there is nothing to take it out of the rule of general average. The *Achilles* could not have got off the bank at less expense, nor have set aside the agreement afterwards. The agreement was not in itself inconsistent with this being a salvage service, for salvage may become due even if the services are unsuccessful. There is no case of salvage in which ship and cargo have been distinguished, for the Admiralty Court has no jurisdiction over general average contribution. This was in fact a salvage agreement as understood in Admiralty: *The Undaunted* (4); *The Melpomene* (5); *The E. U.* (6). The ship was in peril requiring immediate assistance, and the agreement to pay 10,000 taels was reasonable under the circumstances: see Abbott on Shipping, 3rd ed. p. 339, s. 10, and the case there cited of a ship putting into port to avoid capture.

A payment for the general good stands on the same footing as a material sacrifice; the only question is, was it a reasonable thing to do? If the services had not been successful the ship would have borne the whole burden. This was not a case of extortion as in *The Helen and George* (7). The burden of proof is on those who seek to set aside the agreement. Where the salvor is in danger she is entitled to substantial payment: *The Phantom* (8). The question of public policy is covered by the finding of the jury on the question of reasonableness.

Cohen Q.C. in reply. The agreement is inconsistent with the principles of salvage as administered in the Court of Admiralty:

(1) Law Rep. 3 A. & E. 369.
(2) Lush. 335; 15 Moo. P. C. 133.
(3) 1 P. D. 272; 2 P. D. 5.
(4) Lush. 90.
(5) Law Rep. 4 A. & E. 129.
(6) 1 Ad. & Ec. 63.
(7) Swab. 369.
(8) Law Rep. 1 A. & E. 58.

H. L. (E.) 1884 ANDERSON v. OCEAN STEAMSHIP COMPANY.

The City of Chester (1); *The De Bay* (2). One party cannot fix an amount without any reference to the circumstances. The learned judge did not call attention to the form of the agreement, which was inequitable on the face of it. It would have been invalid against the shipowners if they had not subsequently ratified it. If it was in its nature a salvage agreement, it should be dealt with according to the Admiralty rules relating to salvage agreements, under which it could not have been enforced.

The House took time for consideration.

Dec. 5. LORD BLACKBURN:—

My Lords, the first paragraph of the statement of claim is as follows (3):—

"In consideration that the plaintiffs, at the request of the defendants, had taken on board a ship of the plaintiffs called the *Achilles* certain goods of the defendants to be carried on board of the said ship from Hankow to London, the defendants promised that they would contribute and pay their just share and proportion in respect of the said goods of any general average loss that might arise or happen to the ship during the said voyage." The statement then proceeds to aver that the ship with the goods on board took the ground, and that the ship and cargo were in danger of perishing, and that "her master and crew were unable to rescue the said ship or the said cargo from the said danger, help and assistance were obtained, and were necessary and proper for that purpose, for which the plaintiffs were obliged to pay, and did pay, £2691 19*s.* 6*d.*; and that the ship and cargo were by means of the said help and assistance preserved." If there was a general average to which the defendants were to contribute, it is not now in controversy that the defendants' proportion of £2691 19*s.* 6*d.* would be £162 11*s.* 7*d.*, and for that sum the action was brought. There can, however, be, I think, no doubt that the plaintiffs are not tied down to recover that exact amount or nothing. If it was proved that

(1) 9 P. D. 182.
(2) 8 App. Cas. 559.
(3) The statement of defence admitted the allegations in the first paragraph, but denied all the rest of the claim.

there was a claim for general average, but that the amount for which the claim was made out was less than £2691 19*s.* 6*d.*, the plaintiffs might still recover the proper percentage of that amount actually made out.

The defendants, by their statement of defence, put the plaintiffs on proof of everything; and contended, and I rather think still contend, that the plaintiffs are not entitled to recover anything. But they seem to have had doubts upon that subject, and therefore bring £75 into Court. What the effect of this mode of pleading might be on the costs I do not stop to inquire. It certainly shews, to my mind, that besides the issue, whether there was a general average at all, there was a serious issue as to what the amount was to which the cargo had to contribute as a general average.

I may as well clear away a matter of prejudice. If any one is insured in the ordinary form his insurers would have to indemnify him for general average. It is, therefore, usual enough for a merchant who is insured to hand over the defence to his insurers; if they can make out that the merchant is not liable at all, there is no claim on the insurers; if they can make out that the amount payable is less than demanded, the claim on the insurers is less. I think it very likely that in this case insurers are defending the action in the name of the defendants, though I do not know that it is so, but that makes no difference in the law, and should make none as to the findings of fact. No more contribution is exigible from the owner of a parcel of goods that are insured than from the owner of a parcel that is not insured.

On the trial evidence was produced on behalf of the plaintiffs only, the defendants calling none. At the close of the case it was submitted that there was no case, and various objections were taken. One of these I may now notice. There was evidence —I do not now say more—that not only the ship, but also the cargo, were exposed to a peril from which the master and crew were unable to rescue her; that the assistance of the *Shanghai* was requested and was granted; and there was evidence that by the assistance of the *Shanghai* the ship and cargo were saved from that peril. Mr. Cohen's objection, if I understood him rightly, was that, assuming all to be true which this could prove,

H. L. (E.) 1884 ANDERSON v. OCEAN STEAMSHIP COMPANY. Lord Blackburn.

it would shew a claim of salvage for which the owners of the *Shanghai* might have brought a suit in the Court of Admiralty against the ship and cargo, and that in that Court the amount of the fair reward would have been decided by the judge of the Admiralty, having consideration as to everything; the peril to the *Shanghai*, which does not seem to have been great, being one element, and the sum which the owners of the *Shanghai* in all cases demanded being another, but not a conclusive one. But I think this was not a tenable point. The owners of the *Achilles* paid the amount demanded by the *Shanghai* as a disbursement; after they had been paid the owners of the *Shanghai* could not have brought any suit. And I think it would be a very unjust rule of law that the cargo-owners should go free from a payment which they might have been forced to make to the *Shanghai*, because the owners of the *Achilles* did not put the *Shanghai* to a suit in the Court of Admiralty, but, rightly or wrongly, paid as a disbursement the whole amount demanded. I do not think that the owners of the *Achilles* could, by paying the claim of the *Shanghai*, entitle themselves to recover more from the goods owners than the *Shanghai* could have recovered in a salvage suit against the goods owners, but I do not see why they might not recover whatever it was fair and just should be paid as a contribution.

General average, as is explained in Abbott on Shipping, Part III., chapter 8 (page 342) of the fifth edition, the last published in Lord Tenterden's life), is founded on the Rhodian law, which however in terms did not extend further than to cases of jettison, but its principle applies and it has been applied to all other cases of voluntary sacrifice for the benefit of all, that is, if properly made. Those things which are actually saved in the sense explained in Abbott on Shipping, Part III., chapter 8, sect. 13, fifth edition, p. 355 must contribute.

In *Kemp* v. *Halliday* (1) I said: "In order to give rise to a charge as general average, it is essential that there should be a voluntary sacrifice to preserve more subjects than one exposed to a common jeopardy, but an extraordinary expenditure incurred for that purpose is as much a sacrifice as if instead of money

(1) 6 B. & S. 746.

being expended money's worth were thrown away. It is immaterial whether the shipowner sacrifices a cable or an anchor to get the ship off a shoal, or pays the worth of it to hire those extra services which get her off. It is quite true that so long as the expenditure by the shipowner is merely such as he would incur in the fulfilment of his ordinary duty as shipowner it cannot be general average." And I may observe that in the specimen of an adjustment given in Abbott on Shipping, Part III. chap. 8, sect. 16, p. 359, 5th edition, and sanctioned by Lord Tenterden's high authority, one of the items allowed is "expense of bringing the ship off the sands, £50." That item must have been a disbursement to pay for services hired.

I think that the promise stated in the first paragraph of the statement of claim is one that would be implied by law in every contract for the carriage of goods. The shipowners have, I think, a lien till the contributions are paid or secured. The goods owner may raise the question whether any, and if any, what contribution is due, by offering to pay what, if anything, he admits to be due; demanding the goods, and if refused bringing trover; and so raising the question whether he has been ready and willing to pay enough. But I see no reason why the same question should not be raised in this form of action. Questions of this sort are generally more conveniently settled by average adjusters as arbitrators, or by stating a case on any question of law, on which the opinions of average adjusters differ; but the action having been brought must be disposed of.

I have come to the conclusion that, on the evidence given at the trial, it was not a simple issue whether the whole sum actually paid by the shipowners to the owners of the *Shanghai* was chargeable to general average, and, if that was not made out, that nothing was to be recovered.

I do not think that it would follow merely from the shipowner having become liable to pay, and having paid that sum, that the whole of it was chargeable to general average. I think it might well be that on this evidence the proper conclusion was that something differing from that sum might be chargeable, and I think that, till it is ascertained whether any sum was chargeable, and what that sum was, the case is not ripe for decision. And I

H. L. (E.) 1884 ANDERSON v. OCEAN STEAMSHIP COMPANY. Lord Blackburn.

do not think that the answers by the jury to the questions asked by the learned Judge at the trial suffice to enable this House to solve that question.

I have therefore come to the conclusion that neither the judgment given by Cave J. in favour of the plaintiffs for the whole amount, nor the order of the Divisional Court entering judgment for the defendants, nor the order now appealed against restoring the judgment below, can be supported, and that the only course that can be adopted by this House is to order a new trial.

The principles on which I come to this conclusion have not often been discussed in a court of law; they probably often come before average adjusters and are of great importance.

The contract of the shipowner is to carry on the goods to their destination. In *Beldon* v. *Campbell* (1) it is said by Parke B. with, I think, perfect accuracy, "there is no doubt of the power of the master by law (but some as to what extent it goes) to bind the owner. The master is appointed for the purpose of conducting the navigation of the ship to a favourable termination, and he has as incident to that employment a right to bind his owner for all that is necessary, that is, upon the legal maxim, quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud." And I think that if the question here raised had been whether the owners of the *Achilles* were bound by a contract made by their master to pay the owners of the *Shanghai* the sum in question, the first questions asked by Cave J. would have been perfectly right. I do not, however, think that on the evidence any question of the authority of the master to bind his owners really was raised. The two sets of shipowners had a common agent, Drysdale, Ringer & Co., and I should rather conclude that Drysdale, Ringer & Co. were the persons who on behalf of the owners of the *Shanghai* agreed to send out the *Shanghai* to help the *Achilles* as soon as the master of the *Achilles* signalled that he wanted help, and that the amount of remuneration to be paid by the owners of the *Achilles* to the owners of the *Shanghai* was not discussed or settled between the captains at all, but was settled in the first instance by Drysdale, Ringer & Co., and afterwards the two sets of shipowners ratified and

(1) 6 Ex. 886, 889.

agreed on what they settled. I think therefore that it was quite clear that there was a contract binding on the owners of the *Achilles* to pay this sum of £2691 19*s.* 6*d.* to the owners of the *Shanghai*, whether it was made by themselves or by their master for them is, as far as regards the binding of the owners of the *Achilles*, unimportant. But neither the owners of the ship nor their master have authority to bind the goods, or the owners of the goods, by any contract. The master has, I think authority to make for his owners all disbursements which are proper for the general purposes of the voyage, and when once those disbursements are paid for, either by the master out of funds belonging to the owners which the master has, or by funds which the owners themselves apply to discharge a contract which they either could not dispute because the master had bound them to make it or did not choose to dispute, I think that the disbursement, in so far as it is a disbursement for the salvation of the whole adventure from a common imminent peril, may properly be charged to general average. But I think that there is neither reason nor authority for saying that the whole amount which the owners of the ship choose to pay is, as a matter of law, to be charged to general average. And though I quite agree that there is some evidence here that the *Achilles* and her cargo were both in danger, and were both saved by the services of the *Shanghai*, and though I also agree that it is not a question of law whether the amount of the sum charged as a disbursement was exorbitant or not, still I cannot find that any question as to the amount was submitted to the jury.

It seems to me that if such a question had been submitted to a jury there is much in the evidence that might make it very doubtful whether the jury would think this sum properly chargeable against the owners of the goods if uninsured. If they thought the charge was against underwriters, there is a common enough impression, not confined to jurymen, that the underwriters' trade is such as to make it right to be liberal in deciding any doubtful question against them. I do not think this ought to influence, but it might do so. I cannot, however, find that the opinion of the jury was taken at all as to the amount. On a new trial that question may be raised, and it may be a subject of

H. L. (E.) 1884 ANDERSON v. OCEAN STEAMSHIP COMPANY. Lord Blackburn.

great difficulty to say what evidence bears on it, and what the proper directions to the jury should be. I think it better not to prejudice the question further than by saying that the fact that the owners of the *Achilles* had by contract, made either by their master or by themselves, become bound to pay this sum, and had paid it, is not, I think, conclusive that the whole of it was chargeable to general average, though part of it may be.

If your Lordships agree in this opinion, I think that the order of this House should be for a new trial, and that all the costs of the trial, and in the Divisional Court and in the Court of Appeal, are thrown away; and that as neither party can be said to have succeeded in this House, each party should bear his own costs in this House.

I therefore move accordingly.

EARL OF SELBORNE L.C.:—

My Lords, I agree in the opinion which has just been delivered by my noble and learned friend, and do not desire to add anything to it. The way in which I propose to put the question to the House is this:—that the order appealed from be reversed except so far as it rescinds the order of the Queen's Bench Division to enter judgment for the defendants; that the case be remitted to the Court below with directions for a new trial; and that there be no costs of the appeal.

LORD WATSON:—

My Lords I concur and have nothing to add to what has been said by my noble and learned friend, Lord Blackburn.

Order appealed from reversed except so far as it rescinds so much of the order of the Queen's Bench Division as ordered judgment to be entered for the defendants. Cause remitted to the Court below with directions for a new trial.

Lords' Journals 5th Dec. 1884.

Solicitors for appellants: *Waltons, Bubb & Walton.*
Solicitors for respondents: *Flux, Son & Co.*

[HOUSE OF LORDS.]

SMALL AND OTHERS (SHIELL'S TRUSTEES) . APPELLANTS; AND SMITH AND OTHERS (LIQUIDATORS OF THE SCOTTISH PROPERTY INVESTMENT COMPANY BUILDING SOCIETY) . . . . . RESPONDENTS.

H. L. (Sc.) 1884 Nov. 24.

Building Society—Bond of Corroboration—Ultrà vires.

A building society advanced in 1876 to A., a member, £1000. A. disponed in security an ex facie absolute disposition of certain subjects, which were already burdened by a prior mortgage. In 1879 A.'s estates were sequestrated, and the directors of the society, in order to prevent a sale of the subjects at an alleged loss, granted B. a bond of corroboration guaranteeing the payment of his prior mortgage.

In 1882 an order for the voluntary winding-up of the society was made, and the liquidators instituted this action concluding for reduction of the bond of corroboration granted to B. as being ultra vires of the directors and in violation of the rules and constitution of the society:—

Held, affirming the decision of the Court below, that the bond was ultra vires, being a transaction not authorized by the rules, and not incidental to the conduct of the society's business.

APPEAL from the Second Division of the Court of Session, Scotland.

The Scottish Property Investment Company Building Society was incorporated under the Building Societies Act of 1874 (37 & 38 Vict. c. 42).

The rules of the society material to the question involved are, inter alia, as follows:—

Rule 2: "The objects of the society shall be, by the subscriptions, or payments of its members, to form a fund in shares of twenty-five pounds each" . . . . "out of which fund members who are desirous of erecting or acquiring dwelling-houses or other heritable property may receive advances upon heritable security by way of mortgage, to enable them to do so, and generally the objects allowed by the Building Societies Act, 1874."

30. "Advances shall be made for periods of either four, six, &c., or fourteen years, as individual members may prefer, and shall be

H. L. (Sc.) 1884 SMALL v. SMITH.

repayable in advance by fortnightly instalments," according to fixed rates.

33. Applications for advances were to be in certain given forms. These forms contained questions, but the fact that there might have been a prior incumbrance was not alluded to.

34. "When the directors are satisfied that the property offered is a sufficient security, such property shall be conveyed to the society by absolute disposition, or by bond and disposition in security, or such other deed as the law agent of the society may require; and the same and all other necessary title deeds relating thereto shall be deposited with the society; and the directors shall then give the party who has sold the property, or who is to grant the necessary deed, an order on the society's bankers for the amount agreed to be advanced by the directors."

42. "Should any member after receiving an advance leave the building unfinished, the directors shall be at liberty" to enter upon and sell or complete the same.

61. "When any member who has obtained an advance allows his instalments and interest, or any disbursement made on his account, to fall into arrear . . . . it shall be in the power of the society to enter into possession of the property in respect of which the advance has been made, and to draw and uplift the rents, &c. . . . . and shall be entitled to recover the same by sequestration or other legal process, and in general the society shall have full power to act as absolute proprietors of the property."

66. "It shall be lawful for any member with the consent of the directors to sell his right and interest in any property which had been conveyed either absolutely or in security to the society, and the purchaser shall thenceforth become a member. . . ."

68. "Any member may redeem the property on which he has obtained an advance. . . ."

77. "So soon as the sum standing in the books of the society at the credit of any member in respect of one or more unadvanced shares held by him shall amount to £25 for each share, the amount shall be paid over to such member, and he shall cease to be a member in the society."

84. "It shall be lawful for the directors to lay out and dispose of any sum of money which may not be immediately required

by borrowing members on heritable security, or on such other securities as they may think fit, allowed by the 25th section of the Building Societies Act, 1874, and the directors may alter and vary such securities as often as they think fit."

86. "The society may receive deposits or loans at interest from the members, or other persons, or from corporate bodies, joint stock companies, or any terminating building society, to be applied to the purposes of the society; and the directors shall for the purposes of the society have power to borrow such sums from the society's bankers or other persons as they may deem advisable. Provided always, that the total sum of money to be received or borrowed under this rule shall not at any one time exceed two-thirds of the amount for the time being secured by mortgage from its members to the society. The sums so borrowed shall form a preferable charge against the funds, claims and effects of the society."

96. Referred to the general powers of the directors, and is quoted by the Lord Chancellor, p. 130.

William M'Donald, a member of the society, obtained in 1876 an advance from the society of £1000 and in security he granted: (1.) A personal bond in favour of the society, dated the 3rd of August, 1876, by which he bound himself to repay the £1000 in fourteen yearly instalments of £101 each; (2.) An ex facie absolute disposition in favour of the society of heritable subjects then belonging to him in Dundee, dated the 3rd of August, and recorded in the register of sasines the 11th of September, 1876. At the time this transaction was entered into there existed as prior burdens on the same subjects, (1), a bond and disposition in security for £2500 granted by William M'Donald in favour of the appellants, David Small and others, as trustees of the late John Shiell, dated the 2nd and recorded the 3rd of August, 1876; and (2), a bond and disposition in security for £500 granted by William M'Donald in favour of D. M. Mills, dated and recorded the 30th of August, 1876. This latter bond was assigned to Mr. David Small in 1878. The property in 1876 was valued as worth £4000 but at the date of this action it had admittedly much depreciated in value. In October, 1878, the City of Glasgow Bank stopped payment and a great depreciation of building property followed.

H. L. (Sc.) 1884 SMALL v. SMITH.

On the 16th of December, 1878, William M'Donald's estates were sequestrated. On the 6th of February following the holders of the above-mentioned two prior bonds and dispositions in security served a notarial requisition for payment, with a view to a sale of the subjects. Certain communings took place between the society and solicitors acting for the bondholders; the result being that bonds of corroboration were granted in the name of the society in favour of the prior bondholders.

The bond of corroboration in favour of the prior bondholders, the appellants, John Shiell's trustees, is dated the 16th of May, 1879. It is signed by the secretary and two of the directors of the society, and after narrating the security held by the appellants it proceeds:—

> And also considering that the sums of money contained in the said bond and disposition on security still remain due and unpaid, and that we, the Scottish Property Investment Company Building Society, now stand vested in the said subjects, conform to disposition granted by the said William M'Donald in our favour, dated the 3rd day of August, and recorded in the register of sasines kept for the burgh of Dundee the 11th day of September, all in the year 1876, and that it has been agreed between the said accepting trustees of the said deceased John Shiell and us, the Scottish Property Investment Company Building Society, at the request of us, the said society, that the said sums of money shall constitute a debt and burden upon us, the Scottish Property Investment Company Building Society, and our successors and assignees, and that the personal obligations contained in the said bond and disposition in security shall subsist and be effectual not only as against the said William M'Donald and his foresaids, but also against us, the Scottish Property Investment Company Building Society, and our successors; and that the real security over the said lands and others constituted by the said bond and disposition in security for payment of the said sums of money shall subsist and remain in full force and effect during the not payment of the said sums: And now, seeing it is proper that, in accordance with the agreement between the said accepting trustees of the said now deceased John Shiell and us, the Scottish Property Investment Company Building Society, that we, the said building society, should grant our personal bond of corroboration in favour of the said accepting trustees for payment of the foresaid sums of money: Therefore we, the Scottish Property Investment Company Building Society, do hereby, without hurt or prejudice to the bond and disposition in security before narrated, or to the personal obligation and the real security constituted by the same for payment of the sums of money thereby due, but in corroboration thereof et accumulando jura juribus, bind ourselves, and the whole funds and property of the said society, and our successors, to make payment to the said David Small, &c., of the foresaid sum of £2500 of principal, and that at the term of Martinmas in the year 1879" . . . "and the interest of the said principal sum at the rate of £5 per centum per annum from the term of Martinmas, 1878."

The directors on M'Donald's bankruptcy entered into possession of the subjects. The society became embarrassed, and on the 14th of November, 1881, a special general meeting resolved that the society should be wound up voluntarily under the supervision of the Court in terms of the Building Societies Act of 1874. The respondents were appointed liquidators, and repudiating all liability under, inter alia, the bond of corroboration in favour of the appellants, they instituted this action to have it set aside and reduced. They pleaded, inter alia, that the granting of the bond was "ultra vires of the directors and in violation of the rules and constitution of the society."

The appellants in their answers averred, inter alia, "that on the proposal and at the solicitation of Mr. David Stewart, solicitor, Dundee, the society's accredited agent there, duly authorized to that end, Messrs. Shiell & Small, solicitors, Dundee, as agents for the said bondholders, agreed not to proceed on the said intimations of sale, and to allow the loans to continue upon the society granting bonds of corroboration in favour of the creditors in the said bonds. In accordance with this arrangement the bonds of corroboration were prepared by Messrs. Shiell & Small as acting for the creditors, revised by Mr. Stewart, and by him forwarded to the head office of the society in Edinburgh. They were returned to Mr. Stewart duly executed in terms of the society's rules, by two directors and the secretary and sealed with the society's seal, and were by him returned in ordinary course to Messrs. Shiell and Small on behalf of the creditors. In consideration of the granting of the said bonds of corroboration the appellants departed from their intimation calling up their bonds, which they otherwise would have insisted in."

They pleaded, inter alia :—

"(2) The bond of corroboration sought to be reduced, having been by admission of the pursuers executed by two directors of the society, and by the society's secretary, and sealed with the society's seal, in terms of the society's rules, and delivered to the appellants by the society's officers and agents as the society's deed; and separatim, being within the scope of the society's business, is valid and not liable to reduction; or at all events the pursuers are not, in a question with the appellants, now entitled

H. L. (Sc.) 1884 SMALL v. SMITH.

to repudiate it, but must seek their relief, if any, against the parties so executing and delivering it." The respondents had also pleas to the effect that the bond was irregularly granted, its execution not having been authorized by the society. But the question of ultra vires being decided against the appellants, this plea was not touched upon by the Second Division.

The Lord Ordinary (1) by an interlocutor dated the 10th of February, 1883, sustained the reasons of reduction. This decision was adhered to on the question of ultra vires by the Lords of the Second Division by interlocutor dated the 13th of July, 1883 (2).

On appeal, Nov. 21, 24, 1884. *The Lord Advocate* (*Balfour*, Q.C.), and *Henn Collins*, Q.C. (with them *P. R. Don*), maintained, for the appellants, that the granting of the bond of corroboration was a valid transaction. The society, subject to the prior mortgages, were absolute proprietors of the subjects under M'Donald's disposition. The bond of corroboration was proved to be a matter of arrangement between those acting for the appellants and the society. If the prior mortgagees had sold in the then state of the market there might have been a total loss of the £1000 advanced by the society. And the delay of the sale was a good consideration for the bond. It was an act done every day for a postponed heritable mortgagee to either pay off a previous mortgage, or if not in funds to get the mortgagee to postpone the sale. No doubt the granting of a bond of corroboration was not one of the objects for which the society was constituted, but the rules empowered the directors to lend on postponed heritable securities. And they had also the power to borrow and pay off prior incumbrances. If the society had been in funds there was no doubt they could have paid off the appellants' claim: but instead —having, perhaps, a large amount of depreciated heritable property thrown on their hands—they granted the bond of corroboration. They submitted that if a society has entered into a transaction which is within the scope of its business, any act which is reasonable and proper to protect and make available its interests under that transaction, will be supported: Selwyn, L.J.,

(1) Lord M'Laren. (2) 10 Court. Sess. Cas. 4th Series, p. 1198.

in *In re Asiatic Bank, Royal Bank of India's Case* (1). Here the granting of the bond of corroboration was a prudent thing to do. It was incidental to the society's business, and necessary to save their security from becoming a total loss.

[They also cited *Fraser* v. *Glasgow Bank* (2); *Attorney-General* v. *Great Eastern Ry. Co.* (3).]

[LORD BLACKBURN mentioned *Brooks & Co.* v. *Blackburn Benefit Society* (4).]

Davey, Q.C., and *Strachan*, for the respondents:—

On the appellants lay the burden of shewing that granting a bond of corroboration arises by necessary implication from the rules. There was no express provision, and every minute detail is provided for. The directors' powers were strictly defined, and they had no discretion beyond what the rules gave them. The society was constituted to lend money to a member to the amount of his shares in advance; it was not intended to give any member an advance beyond the amount of his shares. No doubt in Scotland it might not be a breach of trust to lend on a second or third mortgage. But the rules here shewed it was never contemplated to lend money on anything but a first mortgage. The bond in question was nothing else than a gratuitous guarantee by the society for a debt due by a third party and for which they were in no way responsible. Such a transaction was manifestly beyond the scope of their business.

Bonds of corroboration were no doubt sometimes granted by proprietors of securities granted over their properties by their predecessors. But the society were not proprietors of the subjects mortgaged, they were only heritable creditors. As to the loss to the society being the same if the society had paid the appellants' debt and taken an assignment, it would not have been so, for the society after a transaction of that kind could sell when it suited them. Moreover, there was only one case in which the directors under the rules would have been entitled to have done so, and

(1) Law Rep. 4 Ch. at p. 260.
(2) 6 Court. Sess. Cas. 4th Series, p. 1259.
(3) 5 App. Cas. 473.
(4) 9 App. Cas. 857.

H. L. (Sc.) 1884 SMALL v. SMITH.

that was when they had money in hand which was not immediately required. But the society had no money not required by its members, on the contrary they were in embarrassed circumstances.

In re Asiatic Bank, Royal Bank of India's Case (1) did not apply. The granting of the bond was not of the nature of those acts which the Court have held to have been necessary or ancillary to the execution of certain powers. It was neither a direct nor necessary consequence of the society having advanced money on the property on a postponed security, nor was it a proceeding which a person would be reasonably expected to resort to. The security proposed to be protected was at that time practically valueless, and the obligant in the debt had become bankrupt. No man of prudence in dealing with his own affairs would undertake a personal liability in such circumstances for a debt more than double the amount of his security, simply to prevent the first bondholders bringing the subject of the security to a sale.

[Their further argument is fully given in the Lord Chancellor's judgment (2).]

The Lord Advocate in reply :—

[He was relieved from arguing that the rules of the society did sanction the lending of money on second and third mortgages, as there was no doubt they did.]

EARL OF SELBORNE, L.C. :—

The material facts in this case are these : Under the rules of this building society, formed under the statute of 1874, the society in 1876 made an advance of £1000 to Mr. M'Donald, one of their members, and he gave them security upon certain building property belonging to him. It appears very distinctly upon the face of the deed that the property was at that time subject to a charge in favour of the present appellants and others amounting to £3000, and by the contract it is stated to be a condition of the advance "that the society should have the right transferred to them to pay off the heritable burden amounting to the sum of £3000 already

(1) Law Rep. 4 Ch. 252. (2) See post, pp. 131, 132.

affecting the subjects." Then it goes on to say that he bound himself to repay to the society the expenses of discharging the security. That was the contract between Mr. M'Donald and the society.

I think that we must abstain from taking notice of anything which we are not informed of by the record or by the admissions which the parties have agreed to in their cases. I therefore cannot make any assumption as to the circumstances which led to the transaction of 1879 beyond what the record states, but it appears that at that time the prior incumbrancers who are mentioned in the deed to the society, had given notice that they proposed to exercise the power of sale incidental to their security which, if exercised, of course would result in producing more or less,—which might or might not be enough to pay off their security. If it were more than sufficient for that purpose, no doubt the surplus would be applicable to the society's security—if it were less, the society's security would be lost.

In those circumstances, some communings took place between the parties which were pleaded in the Court below in a manner which I must confess appears to me to explain the use of the word "gratuitous" by Lord M'Laren in his judgment (1). The parties were not absolutely agreed in their way of pleading the facts although they were not very far apart; but nothing more was averred, even on the part of the defenders, than this: that the solicitors, Messrs. Shiell and Small, who acted for the bondholders, agreed not to proceed on their notice of sale and that in consideration of getting the bond of corroboration they departed from their intimation of calling up their bond which they otherwise would have persisted in; so that as far as that goes, no definite forbearance, no definite giving of any particular period of time at all, appeared upon the record, although that has now been supplied by the letters in the appellants' case, of which we are entitled to take notice. That, I think explains the fact that Lord M'Laren did not really look beyond the corroboration bond itself, on the face of which I think his Lordship was perfectly justified in saying that it was gratuitous, because there is no consideration proceeding from the prior incumbrancers referred to on

(1) 10 Court Sess. Cas. 4th Series, at p. 1201.

H. L. (Sc.) 1884 SMALL v. SMITH. Earl of Selborne, L.C.

the face of it, and there is no contract by them contained in that instrument or in any other document which then appeared upon the record.

The prior incumbrancers having given the notice and these communings having taken place, of which we now know more than the Court below did, the corroboration bond in question was given; and it certainly is rather a remarkable instrument on the face of it to have been given on behalf of a society of this description without a clear and express power authorizing it; for it says that it has been agreed between the accepting trustees of Mr. Shiell (the prior incumbrancers) and the building society, at the request of the building society, that the debt due to the prior incumbrancers "shall constitute a debt and burden upon us, the Scottish Property Investment Company Building Society, and our successors and assignees, and that the personal obligations contained in" the prior security "shall subsist and be effectual not only as against William M'Donald," the mortgagor, "and his foresaids but also against" the building society, and so on, and that the security at the same time shall be in full force in favour of the prior mortgagees and that the building society shall grant their personal bond and so on; and they proceed to do so,—to give a personal bond, binding themselves and the whole funds and property of the society to make payment to the prior incumbrancers "of the foresaid sum of £2500 of principal" at Martinmas then next (this transaction being in May and Martinmas being in the autumn of the same year, six months off) and the interest, and they bind themselves to insure the buildings to the extent of £2500 sterling. There are all those absolute obligations.

I pause to observe upon what I understand to be the effect of these obligations if valid. They impose the debt of Mr. M'Donald for £2500 and interest as a direct and immediate debt payable at six months upon the whole funds and property of the building society. No consideration for that is given except the forbearance, which collaterally appears by letters to have been an agreement to give time for six months. If at the end of those six months, assuming the validity of this bond of corroboration, the creditors had thought fit to demand immediate payment at

Martinmas of this large sum of money from the building society, whether it was more convenient for them to redeem than it had been in May or not, whether they had funds in hand or not, whether it would drive them into insolvency or not, this, if it was a valid obligation, enabled the creditors to transfer the debt against Mr. M'Donald and to compel the society to pay it, convenient or inconvenient, advantageous or ruinous, at their own will and option, to say nothing about the obligation to insure. Well, I do not rest any part of the opinion which I have formed in this case upon the question of the prudence or imprudence of such a transaction, I merely say that on the face of it it appears to me to be a transaction which does not justify itself primâ facie, and which throws upon the person setting it up the burden of shewing that these trustees for the building society who entered into it were really authorized to do so by the nature of their own trust.

Now I entirely adhere to what was said in this House in the case of *Attorney-General* v. *Great Eastern Railway Company* (1), that when you have got a main purpose expressed, and ample authority given to effectuate that main purpose, things which are incidental to it, and which may reasonably and properly be done and against which no express prohibition is found, may and ought, primâ facie, to follow from the authority for effectuating the main purpose by proper and general means. I think it is quite right to invite your Lordships to apply that principle to the present case. In order to see how it applies, we must ascertain first of all what the main purpose here is, then what are the general powers of the directors, then what are their special powers, and then, supposing that this is not within the natural meaning either of their general powers or of their special powers, whether it can be brought in as incidental to the main purpose and a thing reasonably to be done for effectuating it.

Now with regard to the main purpose, the statute under which the society was formed expresses it in the 13th section (2): "Any number of persons may establish a society under this Act either terminating or permanent for the purpose of raising by the subscriptions of the members a stock or fund for making advances

(1) 5 App. Cas. 473.

(2) The Building Societies Act, 1874, 37 & 38 Vict. c. 42.

H. L. (Sc.) 1884 SMALL v. SMITH. Earl of Selborne, L.C.

to members out of the funds of the society upon security of freehold, copyhold, or leasehold estate by way of mortgage." That is the main purpose of the society. There are some subordinate provisions in the Act itself, but none, as it appears to me, which are not subsidiary to that main purpose. Primâ facie, assuming the direct liability for another man's debt without anything coming into the funds or coffers of the society is not a thing conducive to "raising by the subscriptions of the members a stock or fund for making advances to members out of the funds of the society."

Well, there are detailed rules, and the general powers of the directors which have been referred to are in the 96th rule: "The directors shall have power to act for the society in accordance with these rules in all matters that may arise." Manifestly they are to be bound by the rules, and you must collect from the rules, either directly or by legitimate inference, the authority for anything which they are to do.

Now let us look at the particular provisions. The first set of provisions are those which relate to the advances to be made to members on security. Your Lordships have heard a good deal of argument as to the nature of the security which the society may accept, and after hearing that argument you have thought that nothing in this case will turn upon the prudence or the imprudence of taking originally from Mr. M'Donald, a member, when the advance of £1000 was made to him, property already subject to this prior incumbrance. It may have been an imprudent thing, but your Lordships, I believe, are all satisfied that the authority to consider the sufficiency of the security was given to the directors by the 34th rule, and that they in making the advance on this security which they considered sufficient (whether they acted in that respect prudently or imprudently) did not act ultra vires in any manner which can affect the present question. But still that merely touches the first transaction of the advance to Mr. M'Donald upon a second mortgage—it in no degree whatever tends to shew that when they are not advancing to their own members at all, or taking security from a member, they can assume a debt of a member to a third person—that special power is not given to them at all.

Then comes the special power as to sale or redemption contained

in the 13th head. The first rule under that head is the 66th, but the 68th rule is this: "Any member may redeem the property on which he has obtained an advance at any time" upon certain terms. That has nothing to do with this matter; so that does not advance the case of the appellants.

But then there come the borrowing powers. So far from their helping the appellants it appears to me that some very just observations were made upon that subject by Mr. Strachan as shewing that all the inferences to be drawn from the borrowing powers are adverse to the appellants; for, in the first place, of course those borrowing powers must be exercised for the purposes of the rules and not for other purposes. They could not be exercised so as directly or indirectly to effectuate this particular transaction; because your Lordships have held in a case (1) which was before you last session that such a provision as that which we have here at the end of the 86th rule, namely, "The sums so borrowed shall form a preferable charge against the funds, claims, and effects of the society," is in effect a provision that all persons lending to the society under that rule are to stand pari passu as creditors upon the funds and are not to compete with each other by taking special securities upon particular property. But an observation of more importance than that was made by Mr. Strachan, which was this: This power of borrowing is, both by the statute which authorizes it, and in fact gives it, and by this 86th rule which down to that last sentence is almost transcribed from the statute, a limited power. "The total sum of money" (borrowed money this is) "to be received or borrowed under this rule shall not at any one time exceed two thirds of the amount for the time being secured by mortgage from its members to the society," and the money is to be applied to the purposes of the society. Mr. Strachan very pertinently observed that it would be wholly inconsistent with the principles indicated by that rule, which strictly limits, with reference to the assets of the society available for legitimate purposes and the amount for the time being secured by its members to the society, the quantum of the loans to be taken, and at the same time provides strictly for the application of those loans to the purposes of the society, it would be wholly

(1) *Murray* v. *Scott*, 9 App. Cas. 519.

H. L. (Sc.) 1884 SMALL v. SMITH. Earl of Selborne, L.C.

inconsistent with that principle that there should be an unlimited power of charging the funds of the society with other men's debts from which the society derives no direct benefit at all events, which add nothing to its funds and which cannot be applied to its purposes. That provision, therefore, as far as it goes, indicates a principle by no means favourable to the appellants' argument.

Then the appellants fall back upon the general words in the 61st rule. That rule contemplates the failure of an advanced member to make the payments due from him; and undoubtedly that rule is more relevant to the present subject than any of the others to which I have referred, because it does contemplate the case of the society having to do something to take and get the benefit of its security. Now what is the society to do? When a member fails to make his payments, the society without notice may "enter into possession of the property in respect of which the advance has been made and draw, uplift, and discharge the rents or feu duties payable therefrom," and may turn out the member if he is in occupation, or they may recover the rent by sequestration or other legal process. There is that remedy. And then later on, in the 63rd rule, it is provided that they may sell the property. Therefore what they are to do, so far, is pointed out: they may enter into possession, they may realize what they can from the rents and profits, they may charge all the expenses of doing it against the member, and they may, after a certain length of arrear, sell the property by public auction or otherwise as they please. They have not done any of those things, and these powers do not by any means carry by implication any power to enter into such a transaction as the present.

But then it was said (and really the whole argument appears to me to turn upon this) that when the society do so enter into possession or when default is made "in general, the society shall have full power to act in every respect as absolute proprietors of the property." That of course means as between the society and the advanced member, it cannot mean as against anybody else who has a prior title; nor can it possibly mean that when the society enters into possession by its trustees it is to act as absolute proprietor without reference to the rules and without reference to the contract. To put an illustration, could they give the thing

away? Of course it is absurd to enter into any such speculation. The nature of the property in the subject and the incidents of it are limited by the purposes of the society, and by the rules they have made as to things which they can do.

Everything, therefore, in the special words of the rules, is silent upon this matter, and no implication can be drawn as to a power to enter into a transaction of this kind. But the argument really is that because the rules permit this kind of security to be taken, that is to say, give very large and general powers as to securities, which do not exclude the taking of a security on which there is a prior mortgage, therefore there is a potential necessity for entering into a transaction of this kind to protect that security, and therefore there is a reasonable implication that there is power to do it. But I wholly deny that there is any potential necessity at all. If this were a proper consequence of the relation constituted between mortgagor and mortgagee or of the relation constituted between a first mortgagee and a second mortgagee, if it were one of those things which by working out the legal rights or remedies already existing on the one side or the other, would or might result, the argument would be perfectly sound; but there is no more potential necessity for doing this in order to meet a temporary inconvenience than there is for doing anything else in the world which in the opinion of the directors might tend to obviate that inconvenience. For example, supposing that they had no credit by which they could borrow money, and that they were entitled to borrow money to redeem this prior mortgage, could they or could they not make reckless sales unauthorized by the trust deed, of any part of the assets or property of the society? That would be a very improper thing to do, at all events, and no one can possibly say that any such thing is to be implied. The grounds of such an implication must be found in the nature of the situation and the reasonable consequences of that situation and not in what a man who may do what he pleases with his own, may or may not consider proper to do under such circumstances. To say that because a man is a second mortgagee for £1000 it is a natural consequence of that situation, or a potential necessity, that when a notice of sale is given by the prior mortgagee he shall make himself liable to him for £2500 which was not his own

H. L. (Sc.) 1884 SMALL v. SMITH. Earl of Selborne, L.C.

debt before; to represent that as growing out of, or consequential upon, the situation in which the company was placed by what had been done under the rules, is going beyond all bounds of reason.

Now, let me exemplify that by putting an illustration. There happens to be in these rules an express provision for a case different from that which has here arisen. The 42nd rule relates to the case in which advances have been made to enable a person to build upon land which is included in a security. In that case he is to specify the buildings which he proposes to erect, and the society is to approve of them; and the 42nd rule says this, "Should any member after receiving an advance or an instalment thereof, leave the building unfinished or not proceeded with for one calendar month unless upon satisfactory cause shewn," then, after a certain notice, the society "shall be at liberty to enter upon and take actual possession of such building and premises and to sell the same either by public auction or private contract, or to employ persons to provide the requisite materials and labour, and to finish and complete the same at the cost of such member, and to advance the sums requisite for this purpose out of the funds of the society." Well, for that purpose, that is an express rule. Let me suppose that there had been no such rule; could it seriously have been argued that because the company took a security upon land, the value of which they expected to be improved by building, the directors could lay out the whole or any amount they pleased, of the funds of the society in an expensive building speculation,—in building upon the property those houses which the debtor had been expected to build? It was thought desirable that that power should be expressly given; but could any reasonable man have implied it if it had not been given? I am speaking, of course, not of a case of some little work to be done after taking possession in order to complete a building already partially erected upon the land. I am supposing a total failure to build at all, and that the land which constituted the security had no buildings erected upon it, and was not in the state of land covered with houses, although it ought to have been so if the member had fulfilled his contract. I think that there would have been in that case more ground than there is in the present case, to imply the power to do it, because at least, it would have been said, that the

erection of such buildings was in the contemplation of both parties at the time when the society advanced the money. But here nothing of this kind was in their contemplation at all. The only provision made in the deed of 1876 on the subject of this prior mortgage, is the natural one, that the company may redeem it, and, if they do, may charge the expenses which they have been put to as against Mr. M'Donald.

I think, that without subverting all the principles of the authorities which have been cited as to the limits of the powers of building societies and their managers in cases of this sort, it would be impossible to allow this appeal; and I therefore move that it be dismissed with costs.

LORD BLACKBURN:—

I am of the same opinion. I may first deal with one point which Mr. Davey took, which we did not require the Lord Advocate to answer, namely, that a Scotch second heritable security is not a proper security upon which to lend money even if the margin be sufficient. In England there are technical reasons why a second security, the mortgage being of an equitable estate only, however large the margin may be, is not as good a security and as satisfactory as a first security; but in Scotland those reasons do not exist. The effect of its being a second or third security is that the margin is less, because there is the amount of the prior mortgage before it. Where there is a property worth, I will suppose, £100,000, which has upon it heritable bonds of half the amount, that is to say, £50,000, the apparent margin is £50,000, but I do not think that a prudent man would lend upon the £50,000 which is over after the first mortgage, as much as he would upon property valued at £50,000 where his was the first security. A fall in the value of the property would obviously, in the case of the figures which I have supposed, act twice as much upon the deferred £50,000 and bear with twice as great a percentage upon it as it would upon the whole £100,000. That is one reason. Another reason is, that the holder of the prior heritable bonds would be able to come in before the lender and hamper him in attempting to realize his security. For these reasons I do not think that a prudent man would lend as much

H. L. (Sc.) 1884 SMALL v. SMITH. Lord Blackburn.

upon heritable property valued at a certain amount which was subject to a prior mortgage of half that amount as he would upon heritable property of half the amount which was not subject to a prior mortgage. I think that that is sufficient for me to say upon that point. I think it is very likely that in this case the directors, when they lent Mr. M'Donald this sum, were imprudent, and lent upon a margin which was far too little, but I cannot tell that judicially, and I do not in the slightest degree act upon any opinion as to whether it was so or not.

The directors held a security for the society upon a bond for this amount, and the appellants had a prior bond upon the same property to a considerably larger amount. Now, that being so, the next thing which happens is this. When M'Donald had stopped, and the security was evidently a defective one at this time, what were the directors entitled to do? I do not doubt at all that a merchant, a person sui juris, without any restriction at all, has very often made advances to somebody until he has got to the point that he is afraid of losing what he has advanced unless he takes steps to carry the man on and unless a further advance is made. I believe that such a thing is very common. It is more common, in cases which I have seen, that the attempt fails and brings down the man who has bolstered up the other than that it succeeds; but there have been cases, I believe, which have not come into Court, where such a desperate attempt has succeeded, and the man has ultimately been solvent and a great loss has been avoided at a great risk. That may be so, and I do not myself at all doubt that a person who was sui juris might, for the purpose of securing payment of his claim against a debtor, say, "I wish to keep the debtor afloat, and I will bargain with you to give him time; you shall not press him for some time," thinking that at the end of that time he would be well afloat. A guarantee as a consideration for giving time in those circumstances would be one which a person who was sui juris might undoubtedly take upon himself to give. I will not even say that he might not give it prudently. Does it follow from that that the directors had power or authority to do it? I certainly do not think so. The Lord Justice Clerk seems to say that he thinks that if it had been shewn affirmatively that this was a prudent

and judicious thing and a natural thing for them to do, to give time, it might have made it valid; but I do not think, as far as I understand this record, that it was competent for anybody to shew it, and they certainly did not try to shew it. I do not say whether they could shew it or could not. But as at present advised I do not think that the directors had any power at all to do it. It is not a case of persons acting for themselves and being sui juris, who may make any bargain, wise or foolish, which they please, but it is the case of persons acting by an authority. We must see what the authority is. The authority which is given to the directors is, to manage all the affairs of the society according to the nature of its business, according to these rules. I think that according to that they might do very much the same things which by Common Law a partner in a business limited in the same way would be entitled to do, it is not one of the powers which a partner has to give a guarantee. He may do it of course so as to bind himself, but he cannot do it so as to bind the firm. That, I think, has been decided several times. I would refer to *Brettel* v. *Williams* (1) as immediately proving it. That is borne out by many other cases. I mention it merely as an illustration of the principle. Even granting that a person who was sui juris might under similar circumstances give a guarantee, and might possibly find that he had done wisely in doing it (I must own that I think it very improbable that he would so find) does it follow from that that the directors would be able to give such a guarantee? There certainly is no express power given to them to do so, and I can find no reason why they should be able to do it. So far from its being an ordinary and regular part of the course of the business, I think, so far as one can make out from reading the rules expressing what the parties who drew these rules thought was the course of business, there is no indication whatever that they thought that anything of the sort would be done; and it seems to me that just as a partner's apparent authority is limited to what is usual and customary and proper and right in that particular business, and does not extend to giving a guarantee, exactly in the same way and for the same reason the directors' powers here exclude their giving any guarantee. If that be so it is enough

(1) 4 Ex. 623.

H. L. (Sc.) 1884 SMALL v. SMITH. Lord Blackburn.

to determine the whole case. The directors had no power to bind the society by this guarantee (for it is a guarantee in substance and effect) and consequently it must be set aside. Had it turned out well and properly, I dare say that the directors would never have been quarrelled with for having done this; but that is quite another thing. It having turned out badly, if they have got into any difficulties themselves in consequence, that is their look out, but the society is not bound, and consequently I think that the liquidators are entitled to the relief which they seek by this deed being set aside.

LORD WATSON:—

I also am of opinion that the granting of the bond in question was an act beyond the scope of any authority committed to these directors by the statute or by the rules.

It appears to me that the true test to apply in such a case is not to consider whether the act might have been competently performed by an individual, or by directors who were not fettered by regulations, or articles, or a memorandum of association. The real test is to consider whether the act is authorized by the statutory rules of the society, which perform a two-fold function; in the first place they define the power of the directors, and in the second place they ensure that all who deal with the directors shall have notice of the precise limits of their authority. We cannot assume that the directors have power to do everything which may be usually done by unfettered directors, or by individuals. We must consider whether the rules confer, either expressly or by any fair implication, authority upon the directors to grant a bond of corroboration binding upon the society.

Now, the directors in the present case had by the rules power to hold bonds, whether first or postponed bonds, and dispositions in security; and they had undoubtedly not only the power, but the duty laid upon them of realizing those bonds and dispositions in security. It is said to be within the power of the directors, under these rules, to acquire prior bonds for the purpose of protecting the interests of the society as postponed bondholders. I am quite prepared to concede that proposition, but upon this condition only, that the funds of the society are at the time in

H. L. (Sc.)
1884
SMALL
v.
SMITH.
Lord Watson.

the state described in rule 84. In that case the act of acquiring these preferable bonds might be justified under rule 84, because it might be an investment, sanctioned by that rule, of funds which at the time were idle; that is to say, not required for the purpose of being advanced to members of the society. But I demur to the proposition that they would be entitled to swell those funds which are not required for the main purposes of the society by exercising their borrowing powers in terms of rule 86. What they could do in the way of acquiring prior securities, does not appear to me to be in the least degree relevant to or decisive of the question which has to be determined in the present case. They have a general power to realize—they have no general power, and no special and express power, to grant obligations of guarantee binding the society or its funds.

It is said, however, that they have that power by implication in the special case of realization, whenever it becomes expedient and desirable on the part of the society that they should purchase time from the prior bondholder. Now, I quite admit that circumstances might render that a very proper and a very expedient step in the case of an individual sui juris, or in the case of directors who have unlimited powers to conduct business according to the rules which guide individuals; but that is not the question here. Is it in any fair sense of the word incidental, in the sense of being necessarily incidental, to the realization of the security? The rules, as the Lord Chancellor has pointed out, contain a great many very specific provisions upon the subject of realization. None of those provisions point to the exercise of such a power as this; and it humbly appears to me that the purchase of time by granting an obligation of guarantee is a transaction altogether independent of, and quite separate from, the realization of a security. If it were a step in the procedure incidental to realization, then I apprehend it would be a step competent to every agent who was employed by a principal to realize a security upon landed property in Scotland; that is to say, if it were properly and necessarily incidental to the realization. But it is impossible to suppose that an agent to whom is intrusted the duty of realizing a debt heritably secured, is entitled to do anything more than adopt all those proceedings which the law permits by virtue of

H. L. (Sc.) 1884 SMALL v. SMITH. Lord Watson.

the deed itself, or in the present case such proceedings as are expressly warranted and directed by the rules. I cannot conceive that the two transactions are so connected that a direction to an agent to realize a heritable bond, would imply a right on the part of the agent to bind his constituent in an independent personal obligation.

I have, therefore, come to the conclusion that however reasonable it might have been for the society when it had the matter in view, to confer these powers in express terms, they are not conferred by implication, because they are not incidental within that sense which is requisite in order to give the directors power to bind the society and its funds; and such being the legal inference fairly derivable from these rules, it humbly appears to me that the respondents in this case are entitled to have the decree of declarator which the Court below has given them.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 24th Nov. 1884.

Agents for appellants: *Neish & Howell, for Henderson & Clark, W.S., Edinburgh.*

Agents for respondents: *Faithfull & Owen, for Davidson & Syme, W.S., Edinburgh.*

[PRIVY COUNCIL.]

THE ATTORNEY-GENERAL FOR QUEBEC Appellant; J. C.*
1884
AND
Nov. 26.
WALTER REED . . . . . Respondent.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

British North America Act, 1867, *ss.* 65, 92, *sub-ss.* 2, 14—*Quebec Act*, 43 & 44 *Vict. c.* 9—*Powers of Provincial Legislature—Duty upon Exhibits.*

Held, that Quebec Act (43 & 44 Vict. c. 9) which imposed a duty of ten cents upon every exhibit filed in Court in any action depending therein is ultrà vires of the provincial legislature.

Appeal from an order of the Supreme Court (June 18, 1883), reversing a judgment of the Court of Queen's Bench of Quebec (Nov. 24, 1882) and restoring a judgment of the Superior Court of Quebec, district of Montreal (March 10, 1882).

The order declared that a certain duty of ten cents imposed by an Act of the Quebec legislature (43 & 44 Vict. c. 9) on every exhibit produced in Court in any action depending therein was not warranted by law, the Act imposing it being *ultrà vires* of the provincial legislature.

The question arose in an action depending in the said Superior Court, wherein the respondent tendered a promissory note as an exhibit, and the prothonotary refused to receive and file it unless there were affixed to it a law stamp of ten cents in payment of the duty imposed by the said Act. A rule was thereupon obtained by the Respondent and served by order of the Court upon the Appellant to shew cause why the exhibit should not be received without a stamp; with the result as stated above. The judgment of the Supreme Court was pronounced by a majority of the Judges (Ritchie, C.J., Fournier, Henry, and Gwynne, JJ., Strong and Taschereau, JJ., dissenting).

Davey, Q.C., and *Glokensky*, Q.C. (of the Canadian bar), *Pollard*

* *Present*:—The Lord Chancellor (Earl of Selborne), Lord FitzGerald, Sir Montague E. Smith, and Sir Robert P. Collier.

J. C. 1884 ATTORNEY-GENERAL FOR QUEBEC v. REED.

with them, for the appellant, contended that the Act in question was within the competence of the provincial legislature. It was passed several years ago, duly received the assent prescribed by the imperial Act in lieu of the former royal assent to Acts of the former province, was never disallowed, and was acted upon. The duty imposed was not a fresh one, but was identical with the duty of ten cents upon exhibits imposed by the Act 39 Vict. c. 8, which was only repealed and re-enacted by the Act in question. Its validity appears from the following considerations: (a) as imposing "direct taxation" in pursuance of the express power given to the provincial legislatures by the British North America Act, 1867, sect. 92, sub-s. 2; (b) as relating to the administration of justice in the provinces under sub-s. 14 of the same section within the meaning of the words there employed; (c) as being under the provisions of sects. 65 and 129 an alteration of a law in force in the former province of Canada at the union of the provinces into the dominion by the said Act of 1867. In reference to this last reason for the validity of the Act it was contended that up to and at the union Consol. Stat. of Lower Canada, c. 109, s. 32, gave power to the Governor to impose any duty on exhibits in any Court in Lower Canada by Order in Council; that sect. 65 of the Act of 1867 (compare also sect. 129) made such power exercise-able by the Lieutenant-Governor of the province, subject to the legislature of the province; that therefore Quebec Act, 39 Vict. c. 8, sects. 1 and 2, was within the competence of the provincial legislature; and that consequently the Act in question, as a mere amendment or re-enactment of 39 Vict. c. 8, was equally within that competence.

The respondent did not appear.

The judgment of their Lordships was delivered by

EARL OF SELBORNE, L.C.:—

Their Lordships have considered the argument which they have heard, and they have come to the conclusion that the judgment appealed from must be affirmed.

The points to be considered are three; first of all, can this

charge upon exhibits used in the courts of justice of the province be justified under the 2nd sub-section of clause 92 of the British North America Act? Is it a case of direct taxation within the province "in order to the raising of a revenue for provincial purposes?" What is the meaning of the words "direct taxation?"

Now it seems to their Lordships that those words must be understood with some reference to the common understanding of them which prevailed among those who had treated more or less scientifically such subjects before the Act was passed. Among those writers we find some divergence of view. The view of Mill, and those who agree with him, is less unfavourable to the Appellant's arguments than the other view, that of Mr. McCulloch and M. Littré. It is, that you are to look to the ultimate incidence of the taxation as compared with the moment of time at which it is to be paid; that a direct tax is—in the words which are printed here from Mr. Mill's book on political economy—"one which is demanded from the very persons who it is intended or desired should pay it." And then the converse definition of indirect taxes is, "those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another."

Well now, taking the first part of that definition, can it be said that a tax of this nature, a stamp duty in the nature of a fee payable upon a step of a proceeding in the administration of justice, is one which is demanded from the very persons who it is intended or desired should pay it? It must be paid in the course of the legal proceeding, whether that is of a friendly or of a litigious nature. It must, unless in the case of the last and final proceeding after judgment, be paid when the ultimate termination of those proceedings is uncertain; and from the very nature of such proceedings, until they terminate, as a rule, and speaking generally, the ultimate incidence of such a payment cannot be ascertained. In many proceedings of a friendly character the person who pays it may be a trustee, an administrator, a person who will have to be indemnified by somebody else afterwards. In most proceedings of a contentious character the person who pays it is a litigant expecting or hoping for success in the suit; and, whether he or

J. C. 1884 ATTORNEY-GENERAL FOR QUEBEC v. REED.

his adversary will have to pay it in the end, must depend upon the ultimate termination of the controversy between them. The legislature, in imposing the tax, cannot have in contemplation, one way or the other, the ultimate determination of the suit, or the final incidence of the burden, whether upon the person who had to pay it at the moment when it was exigible, or upon any-one else. Therefore it cannot be a tax demanded "from the very persons who it is intended or desired should pay it;" for in truth that is a matter of absolute indifference to the intention of the legislature. And, on the other hand, so far as relates to the knowledge which it is possible to have in a general way of the position of things at such a moment of time, it may be assumed that the person who pays it is in the expectation and intention that he may be indemnified; and the law which exacts it cannot assume, that that expectation and intention may not be realised. As in all other cases of indirect taxation, in particular instances, by particular bargains and arrangements of individuals, that which is the generally presumable incidence may be altered. An importer may be himself a consumer. Where a stamp duty upon transactions of purchase and sale is payable, there may be special arrangements between the parties determining who shall bear it. The question whether it is a direct or an indirect tax cannot depend upon those special events which may vary in particular cases; but the best general rule is to look to the time of payment; and if at the time the ultimate incidence is uncertain, then, as it appears to their Lordships, it cannot, in this view, be called direct taxation within the meaning of the 2nd section of the 92nd clause of the Act in question. Still less can it be called so, if the other view, that of Mr. McCulloch, is correct.

That point, which is the main point, and was felt to be so by Mr. Davey in his very able and clear argument, being disposed of, the next question, upon the terms of the same section of the same Act, is that which arises under subs. 14. One of the things which are to be within the powers of the provincial legislatures —within their exclusive powers—is the administration of justice in the province, including the constitution, maintenance, and organisation of provincial Courts, and including the procedure in civil matters in the Courts. Now it is not necessary for their

Lordships to determine whether, if a special fund had been created by a provincial Act for the maintenance of the administration of justice in the provincial courts, raised for that purpose, appropriated to that purpose, and not available as general revenue for general provincial purposes, in that case the limitation to direct taxation would still have been applicable. That may be an important question which will be considered in any case in which it may arise; but it does not arise in this case. This Act does not relate to the administration of justice in the province; it does not provide in any way, directly or indirectly, for the maintenance of the provincial Courts; it does not purport to be made under that power, or for the performance of that duty. The subject of taxation, indeed, is a matter of procedure in the provincial Courts, but that is all. The fund to be raised by that taxation is carried to the purposes mentioned in the 2nd subsection; it is made part of the general consolidated revenue of the province. It, therefore, is precisely within the words "taxation in order to the raising of a revenue for provincial purposes." If it should greatly exceed the cost of the administration of justice, still it is to be raised and applied to general provincial purposes, and it is not more specially applicable for the administration of justice than any other part of the general provincial revenue.

Their Lordships, therefore, think that it cannot be justified under the 14th sub-section.

With regard to the third argument, which was founded upon the 65th section of the Act, it was one not easy to follow, but their Lordships are clearly of opinion that it cannot prevail. The 65th section preserves the pre-existing powers of the Governors or Lieutenant-Governors in Council to do certain things not there specified. That, however, was subject to a power of abolition or alteration by the respective legislatures of Ontario and Quebec, with the exception, of course, of what depended on Imperial legislation. Whatever powers of that kind existed, the Act with which their Lordships have to deal neither abolishes nor alters them. It does not refer to them in any manner whatever. It is said that, among those powers there was a power, not taken away, to lay taxes of this very kind upon legal proceedings in the Courts,

J. C.
1884
ATTORNEY-GENERAL FOR QUEBEC v. REED.

not for the general revenue purposes of the province, but for the purpose of forming a special fund, called "the Building and Jury Fund," which was appropriated for purposes connected with the administration of justice. What has been done here is quite a different thing. It is not by the authority of the Lieutenant-Governor in Council. It is not in aid of the Building and Jury Fund. It is a Legislative Act without any reference whatever to those powers, if they still exist, quite collateral to them; and, if they still exist, and if it exists itself, capable of being exercised concurrently with them; to tax, for the general purposes of the province, and in aid of the general revenue, these legal proceedings.

It appears to their Lordships that, unless it can be justified under the 92nd section of the British North America Act, it cannot be justified under the 65th.

Their Lordships must, therefore, humbly advise Her Majesty to dismiss this appeal.

Solicitors for appellant: *Freshfields & Williams.*

[HOUSE OF LORDS.]

SIR R. BURNETT, BART. . . . . APPELLANT; H. L. (SC.)

AND 1885

THE GREAT NORTH OF SCOTLAND RAILWAY COMPANY . . . . . RESPONDENTS. *Feb.* 24.

Railway—Stoppage of all Trains—Construction of Feu Contract.

By feu charter, dated 1863, between A., the proprietor of land through which a railway was authorized to run, and the railway company, it was provided that the company should be bound to erect on a piece of ground conveyed to them by A. at a nominal feu rent, "a station for passengers and goods travelling by the said" railway, "at which all passenger trains shall regularly stop," to be called Crathes Station.

The station was erected. Subsequently certain trains were run, namely (1) excursion trains at low fares to certain places on the line, but not to Crathes Station. They were advertised by special handbills, and were not included in the time-tables except in error. (2) Trains called the Queen's messenger trains, ran by arrangement with the Home Office, who paid the railway company a subsidy. (3) Trains called the Post Office trains, ran by arrangement with the Post Office, who also paid a subsidy. The Queen's messenger trains and the Post Office trains only ran during Her Majesty's stay at Balmoral; but they were advertised in the railway company's time-table, and through passengers were allowed to travel by them. They stopped at Crathes by signal, but did not stop regularly for setting down or taking up passengers. There was no contract with the Home Office or Post Office that they should not do so.

A. sought declarator that all trains, including the above, except only such as might be hired for an individual or individuals for his or their exclusive use, should regularly stop:—

Held, reversing the decision of the Court below, that the trains called the Queen's messenger trains, and the Post Office trains, fell within the terms of the contract; but, agreeing with the decision of the Court below, that the excursion trains in the circumstances materially differed from ordinary passenger trains and did not come within the obligation.

APPEAL from the Second Division of the Court of Session, Scotland.

The question raised was whether Sir Robert Burnett, Bart., the appellant, proprietor of the estates of Leys, Crathes, and others, Kincardine, and superior of the land on which Crathes

H. L. (Sc.) 1885 BURNETT v. GREAT NORTH OF SCOTLAND RAILWAY COMPANY.

station is built, was entitled under a feu charter dated 1863, to have certain trains run by the Great Northern Railway of Scotland, the respondents, over their line between Aberdeen and Ballater, regularly stopped at Crathes station.

When the Deeside Railway Company, which was afterwards amalgamated and merged in the respondents' company (1), was formed and authorized to run their line through the estate of Leys, Sir Alexander Burnett, the predecessor in title of the appellant, entered into an agreement with them. Under this agreement, dated the 24th of January, 1853, the Deeside Railway Company undertook, inter alia, to construct a siding at Crathes, in the immediate vicinity of the present station, "for the accommodation of the proprietor and tenants of the estate of Leys; and the said company hereby undertake that any of the passenger trains shall be stopped at said siding, although not appointed by the company's time bills so to do, on a preconcerted signal, to be arranged by the company with the proprietor of the said estate, being shown, so as to take up or set down any passengers proceeding from or to Crathes at said siding."

By feu charter dated the 27th of March, 1863, Sir James Horn Burnett, Bart., the successor and heir-at-law of Sir Alexander Burnett, on the narrative that the Deeside Railway Company had agreed, on his granting the deed, "to erect and build upon the ground hereby disponed, a station" of the railway "for passengers and goods, containing accommodation after-mentioned (which station will be of advantage to me and my tenants in the estates of Leys, Crathes, and others, as well as to the public at large) and to pay the feu duty and perform the other prestations hereinafter mentioned," disponed to and in favour of the Deeside Railway Company certain parcels of land. The deed then continued:—"Declaring hereby that the several pieces of ground above described are disponed to the said railway company, but without prejudice to the deed of agreement between the deceased Sir Alexander Burnett of Leys, Baronet, my brother, and the Deeside Railway Company, dated the 24th day of January and 21st day of February, 1853, for the purposes and subject to the

(1) In 1876 by Great Northern of Scotland Act, 39 & 40 Vict. c. 124.

conditions, restrictions, and clauses herein contained, which are hereby declared to be real liens and burdens affecting the said pieces of ground, namely, the said railway company shall be bound, within twelve months from the date of these presents, to erect, at their own expense, on the said piece of ground first above-mentioned, on the west side of the bridge over the road leading to the said bridge across the Dee in course of erection at Durris, a station for passengers and goods travelling by the said Deeside Railway, *at which all passenger trains shall regularly stop, to be called the 'Crathes' Station*, containing a suitable waiting-room, covered passenger-shed, platform, and all proper accommodation for first-class and other passengers, and to maintain such station in all time coming, it being hereby provided and declared that the said railway company shall be bound to have a signal-post erected at the said station, on which a signal visible from Crathes Castle shall be displayed whenever any passenger or parcel for Crathes shall arrive at the station. It being hereby expressly provided and declared that, in the event of the said railway company not erecting said station within the time above-mentioned, and making the accesses thereto shewn on the said plan, or at any time hereafter discontinuing the use thereof as a regular goods and passenger station of the said railway, then, and in that case, these presents and the rights to follow hereon shall ipso facto become null and void, without declarator, and the said piece of ground, and all buildings and works constructed thereon, shall revert and belong to me and my foresaids, free and disincumbered of all burdens whatsoever, alike as if these presents had never been granted, and this without prejudice to our legal rights and remedies against the said railway company for obtaining implement of the prestations incumbent on them, as above expressed. To be holden, the said pieces of ground and others, of and under me and my heirs and successors in feu-farm, fee, and heritage for ever for payment to us by the said railway company and their foresaids of the sum of five shillings sterling yearly in name of feu-duty, term of Martinmas in each year, beginning the first payment thereof at the term of Martinmas, 1863, for the

H. L. (Sc.) 1885

BURNETT v. GREAT NORTH OF SCOTLAND RAILWAY COMPANY.

year then ending, and so forth yearly, in all time coming;" with a duplicant every twenty-fifth year.

The parcels of land disponed by Sir James Horn Burnett amount to over two acres, and were alleged to be of the annual value of about £10.

The Deeside Railway Company erected the station stipulated for. It is situate between Aberdeen and Ballater, about fourteen miles from Aberdeen, and three from Banchory. In 1877, and again in 1882, some correspondence took place between the respondents and the appellant as to certain trains not stopping at Crathes, and matters not having been satisfactorily arranged in 1882, Sir R. Burnett in 1883, with the object of obtaining a final determination of the matter, raised this action, concluding for declarator that it ought to be declared (but without prejudice to the deed of agreement between the now deceased Sir Alexander Burnett and the Deeside Railway Company, dated 1853) that the defenders are bound regularly to stop at the station called Crathes for the purpose as well of taking up as of setting down passengers, all trains now and hereafter passing through the said station and carrying passengers, except only such trains as may be hired by an individual or individuals for his or their exclusive use, and particularly, so long as they ran them, the following:—

"(1) The train in use to be run during the summer season, leaving, or advertised to leave, Aberdeen for Banchory, Aboyne, and Ballater at or about one o'clock P.M. on Saturdays; (2) the train in use to be run during the summer season, leaving, or advertised to leave, Ballater for Aboyne, Banchory, and Aberdeen at or about eight o'clock P.M. on Saturdays; (3) the train in use to be run during Her Majesty's stay at Balmoral, leaving, or advertised to leave, Aberdeen for Banchory, Aboyne, and Ballater at or about half-past three o'clock A.M. on every day of the week except Monday, but including Sunday; (4) the train in use to be run during Her Majesty's stay foresaid, leaving, or advertised to leave, Aberdeen for Banchory, Aboyne, and Ballater, at or about one o'clock P.M. on Sundays; (5) the train in use to be run during Her Majesty's stay foresaid, leaving, or advertised to

leave, Ballater for Aberdeen and intermediate stations at or about five minutes past three o'clock P.M. on week days; and (6) the train in use to be run during Her Majesty's stay foresaid, leaving, or advertised to leave, Ballater for Banchory and Aberdeen at or about forty-five minutes past ten o'clock A.M. on Sundays."

A proof was allowed, and it appeared from the evidence of Mr. Moffat, general manager of the respondents' line, that at the time when the charter in question was granted the railway extended from Aberdeen to Aboyne, a distance of thirty-two and a half miles, and that it was subsequently extended to Ballater eleven miles further. In 1863, there were five trains running each way stopping at Crathes, and that there were now eight trains each way stopping at that station. His further evidence was substantially as follows:—

The excursion trains mentioned in the first and second conclusions of the summons were only run on Saturdays. They ran from Aberdeen to Ballater, stopping at Banchory and Aboyne. The excursion usually leaves Aberdeen about one P.M. and Ballater at eight P.M. on the return journey; the train goes out, waits and comes back with the excursionists. The object of the train was chiefly to accommodate the working classes. If sufficient people did not come forward, the train would not run. Every person who travels by these excursion trains must hold a special return ticket, which are issued at a lower rate than the ordinary fare. On the journey to Ballater excursionists are set down at Banchory and Aboyne, but no passengers are taken up at these stations in order to go westward. On the return journey the excursionists are picked up at Aboyne and Banchory, but no passengers are set down coming from the west. None of the excursionists are allowed to take luggage. These trains are advertised by special handbills, they do not appear in the time-table. In June and September, 1882, they were entered in the time-table by mistake. The object of the train was to get the people to the place to which the train is advertised to go as quickly as possible. These trains generally run in train loads, that is with the carriage full from the time of departure to the time of return.

The trains in third, fifth and sixth conclusions of the summons

H. L. (Sc.) 1885 BURNETT v. GREAT NORTH OF SCOTLAND RAILWAY COMPANY.

are "Queen's messenger trains" (1), and ran during the Queen's stay at Balmoral. The 3.30 A.M., from Aberdeen to Ballater, ran every day except Monday, including Sunday, in connection with the train arriving at 3.20 A.M. at Aberdeen from the south. The corresponding train left Ballater at 3.5 P.M. and ran in connection with the train from Aberdeen to London. This train ran every day but Sunday. There is next the 10.45 A.M. which ran on Sunday from Ballater in connection with the 12.30 south train from Aberdeen. In the time-tables the first mentioned train was designated the "Queen's special" and the two latter "Express Passengers 1st class." They had been run since 1871; and special subsidies were paid to the respondents by the Home Office for them. During the last ten years the railway company were paid £9278 in special subsidies, being an average of £927 per annum. The members of the Queen's household, other than couriers, could travel by these trains, on paying the ordinary fare. At present travellers coming off the south trains only are

(1) The trains mentioned in the summons except the excursion trains were, inter alia, thus given in the time-table for Sepember 1882.

DOWN TRAINS.

STATIONS.	1.	SUNDAY.	
	Queen's Special.	Queen's Special.	Exp. Pass. 1.‡
	A.M.	A.M.	P.M.
Aberdeen. depart	†3.30	†3.30	†1.0
Crathes . „	..	..	..
Banchory { arrive	..	..	1.35
Banchory { depart	..	..	1.38
Ballater . arrive	5.0	5.0	2.40

† Stop where required to set down passengers off the south train.

‡ Servants accompanying their employers—3rd class.

The 3.30 A.M. special and Sunday express trains will cease to run when Her Majesty leaves Balmoral.

UP TRAINS.

STATIONS.	8.	SUNDAY.
	Exp. Pass. 1.†	Exp. Pass. 1.†
	P.M.	A.M.
Ballater . depart	3.5	10.45
Banchory. { arrive	3.52	11.35
Banchory. { depart	3.55	11.38
Crathes . „	4.1	*
Aberdeen. arrive	4.25	12.15

* Stop by signal to lift passengers for Aberdeen or to stations north and south thereof.

† Servants accompanying their employers, and coach passengers—3rd class.

The 3.5 P.M. express and Sunday train will cease to run when Her Majesty leaves Balmoral.

allowed to travel by the 3.30 A.M. train. But, as a matter of fact, local passengers from Aberdeen had been allowed to travel by this train. It will stop at any station on the line upon notice to the guard; the train has to stop at Banchory for water, but there are no booking offices open for issue of tickets. At Aberdeen there was a watchman, who was authorized to issue tickets to passengers coming from the south, who were not booked through. First class passengers are allowed to travel by the 3.5 P.M. up train from Ballater, and third class tickets are issued to the servants of gentlemen who are travelling first class. The railway company considered they were bound to comply with any request made on the part of the Queen or Home Office as to the time or manner in which these trains shall run. They looked on them as under the control of the Home Office for special purposes of Her Majesty. They could not run those trains unless they got a subsidy.

The train in the fourth conclusion of the summons, namely, that leaving Aberdeen on Sundays at 1 P.M., is run by arrangement with the Post Office, also only during Her Majesty's stay at Balmoral. It was in order to accommodate Her Majesty's correspondence. The Post Office paid the respondents specially for that train. It had run since 1871, and was under the control of the Post Office. The agreement (1) with the Post Office was for carrying the mails generally, and they do it for an annual payment of £9750.

(1) The material part of the agreement, dated October, 1881, and which followed previous agreements of a similar character, set out, "That whereas the said company have agreed to run certain mail trains in manner hereinafter mentioned.

"And whereas it has been agreed between the said Postmaster-General and the said company to enter into the arrangements and agreements hereinafter contained for the term of five years, but without prejudice to any other notice or notices to be hereafter given by him to the said company by virtue of any Act of Parliament, it being expressly agreed between the said parties that nothing herein contained is to limit or control or otherwise affect the rights, powers, or authorities of the Postmaster-General in reference to any statutory notice or notices heretofore given or hereafter to be given by him to the said company, subject nevertheless to the payment of additional remuneration for additional mail trains as hereinafter mentioned.

"And in pursuance of the said agreement, and for the considerations aftermentioned, they, the said company, do hereby bind themselves,

"That they, the said company and their successors shall, during the continuance of this contract, well and truly perform all the services in the said statutory notice contained: and also

H. L. (Sc.) 1885 BURNETT v. GREAT NORTH OF SCOTLAND RAILWAY COMPANY.

Under article 14 of the agreement with the Post Office the respondents were bound to run special trains as they may from time to time require. And it was under that section this train was run in compliance with a special requisition from the Post Office. And the Post Office can object to the train stopping. It was by the permission of the Post Office the respondents carried passengers to their stations in these trains. The respondents looked on them as being out of their control, except as regards the mere running of them. Passengers from Aberdeen may be booked by the one o'clock train to Banchory, Aboyne, Ballater and Crathes. This train never stopped regularly at Crathes, but the respondents booked passengers to Crathes when asked to do so.

There was some evidence of the line in time being pushed on and joined to the Highland Railway and thus becoming a through line. Having to stop at Crathes would interfere with running through trains.

The appellant, inter alia, averred that he was in course of feuing ground at Crathes, and that with regard to that circumstance it was of the greatest importance that all passenger trains should regularly stop at Crathes station.

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shall well and truly perform all other services, or alterations of the said services, of which notice shall be hereafter given to the said company by the Postmaster-General for the time, &c. (subject to the payment of additional remuneration for additional mail trains, as hereinafter mentioned): provided that if the Postmaster-General shall at any time during the subsistence of this contract, by any such notice, require the said company to despatch the mail train from Aberdeen, specified in schedule No. 1, earlier than 10 o'clock ante meridian, or later than 5 o'clock post meridian, or shall otherwise alter or vary the hours of arrival and departure of any of the trains specified in schedules Nos. 1, 2, and 3, beyond the limits provided for in this contract, or shall call upon the said company to run any of the said trains at higher rates of speed, the company shall be entitled to additional remuneration, to be settled by arbitration as set forth in statute 1 & 2 Vict. c. 98.

"(14) Provided always, that the Postmaster-General for the time being, &c., may, at any time during the continuance of this contract, and at any station, require the said company to provide and run any other express or special trains for the conveyance of any other mails, guards, or post officers, when and as he or they shall think fit, and in that case the said company shall furnish and provide any such express or special train accordingly, at and for such and the like compensation, for the use of any such express or special trains, as is hereinafter agreed upon in respect of any additional mail trains to be provided by the said company for the purposes of the Post Office."

The respondents, inter alia, averred that since the date of the feu charter of 1863, circumstances had changed the character of the line. That now, owing to its extension to Ballater, a great development of traffic had taken place, which rendered necessary, in the interest of the public, express trains.

The pleas in law of the appellant were :

(1.) On a sound construction of the feu charter and amalgamated act libelled the pursuer is entitled to decree of declarator as concluded for. (2.) The pursuer as superior of the subjects referred to, is entitled to enforce the obligation in question against the defenders as his vassals therein. (3.) The defenders having already so far disregarded the obligation in question, and having threatened further to disregard it, the pursuer is entitled to decree of implement and interdict, with expenses as concluded for.

The respondents' pleas in law were, inter alia :

(1.) On a sound construction of the said feu-charter, the defenders sufficiently comply with the obligations therein imposed on them, by causing to be stopped at Crathes Station all ordinary passenger trains, such as were in use to be run at the date of the said feu-charter, and were then in intuitu of the parties thereto. (2.) The Queen's messenger trains referred to in the summons being express trains run under special arrangement with and paid for by Her Majesty, the pursuer is not entitled to insist that the said trains shall be stopped at Crathes Station. (3.) The excursion trains mentioned in the summons not being part of the ordinary passenger service of trains, but express trains run for traffic between special places and on special occasions, the pursuer is not entitled to have the same stopped at Crathes Station. (4.) In view of the changed and changing circumstances of the Deeside line, the pursuer is not entitled to decree as concluded for, &c.

On the 3rd of July, 1883, the Lord Ordinary pronounced an interlocutor by which he assoilzied the defenders from the conclusions of the summons and found the pursuer liable in expenses.

The appellant presented a reclaiming note, and on the 20th of December, 1883, the Second Division (Lord Rutherfurd Clark doubting) adhered (1).

On the 20th of March, 1884, their Lordships pronounced an interlocutor ordaining the appellant to pay the respondents 187*l.* 16*s.* 4*d.*, as the expenses of the action.

On appeal,

Feb. 23, 24. Sir *F. Herschell*, S.G., and the *Solicitor-General for Scotland* (*Asher*, Q.C.) (with them *R. B. Haldane*), contended

(1) 11 Ch. Sess. Cas. 4th Series, 375.

H. L. (Sc.) 1885 BURNETT v. GREAT NORTH OF SCOTLAND RAILWAY COMPANY.

for the appellant that the decision of the Court below was erroneous. The words "at which all passenger trains shall regularly stop," constituted an obligation under which the respondents were bound to regularly stop the trains mentioned in the summons. The appellant did not claim that every description of train was included. For instance, a train used for the exclusive carriage of goods would not be a passenger train; or a train engaged by an individual for an excursion would not be within the ordinary meaning of an excursion train; or if the company had made a contract to carry a certain number of people to a certain station and back that would come very near a special train. Nor would they call the Post Office train a passenger train if it carried no person in addition to the railway officials but the Post Office servants. But none of the trains specified in the summons came within these categories. The train called the Post Office train was not under the actual control of the Postmaster-General acting under 1 & 2 Vict. c. 98, and 31 & 32 Vict. c. 119. The only contract with the Post Office department was a time contract. The train was not less under the control of the respondents because they choose to arrange them so as to suit the convenience of particular customers. Nor could the trains called the "Queen's messenger" be said to be hired by an individual for his exclusive use. Both these trains were advertised in the time-table as available to the general public; and any member of the public would be entitled to insist on being carried by them. The excursion train was once advertised in the time-table, and has since been advertised by handbills. The appellant feued the land for 5*s.* a year, but the main consideration was the obligation which, offering greater facilities for railway travelling, would tend to increase the feuars on the appellant's estate. The respondents by repudiating the obligation in toto forced the appellant to obtain a declarator establishing the validity of the obligation; but the appellant did not seek to impose any hardship; he was prepared for the future as in the past to consult the respondents' convenience. The Lord Ordinary was of opinion that the proper mode of enforcing the obligation if it had existed as a condition of the feu was, by a proceeding for the forfeiture of the feu, as provided by the clause of irritancy; but they submitted that was an erroneous view.

[LORD WATSON:—The appellant was quite entitled to an action of declarator to have the right made clear.]

They cited Wightman, J., in *Denton* v. *Great Northern Railway Company* (1).

The Lord Advocate (*Balfour*, Q.C.), and *J. P. B. Robertson*, maintained for the respondents:—

At the time the deed in question was executed, the irregular or special trains, which are the subject of this litigation, were not in esse, and they could not have been within the contemplation of the parties. Again, the clause proceeded on was introduced parenthetically only, not as a substantive obligation, but rather as a description of the station. "All passenger trains" required construction. It could not mean all trains carrying passengers. The trains in question were species of the genus special train. As to the excursion train, it was chiefly to allow the members of the labouring class to spend their half holiday in the country and to take them there and back quickly at a low fare. Special tickets for it were issued which could only be obtained at Aberdeen. No luggage was allowed; and if an insufficient number of excursionists appeared at Aberdeen the train was not run. It was not a part of the ordinary train service of the line. It was advertised by handbills, and was a special offer to persons who are willing to be conveyed to the places named on the handbill. From every point of view, therefore, it was a special train for a special purpose; and to compel it to stop at Crathes Station would upset the whole system on which it was run. They submitted this train at least came within the appellant's own definition of a train outside the obligation.

As to the Queen's messenger and Post Office trains, they were trains by which passengers may subordinately and incidentally travel, provided that privilege did not interfere with the primary intention of the hirer. In fact, they were trains run under special circumstances and a special sufferance. They ran only during Her Majesty's stay at Balmoral, and a subsidy was paid for them. And although advertised in the time-table, the Queen's

(1) 5 E. & B. 867.

H. L. (Sc.) 1885 BURNETT v. GREAT NORTH OF SCOTLAND RAILWAY COMPANY.

messenger trains, at least, did not start at the regular advertised time. The real departure of the train was the arrival of the Queen's messenger, for whose arrival at Ballater it must wait, no matter how many other passengers there might be. There was no contract excluding any passenger, but it was subject to the Home Office's orders.

As to the train designated No. 4 in the summons, the Post-master-General might at any time object to it stopping at Crathes Station. It carries passengers on sufferance, and the Post Office had a power of dictation, and might any day require that none of the public should be carried by it.

[EARL OF SELBORNE, L.C.:—There is no indication of anything being considered except getting from Aberdeen to Ballater within the fixed time.]

It was not in the ordinary sense a passenger train; that is a train over which the station-master had control at Crathes Station. The hour of starting this train and the place of stoppage must be regulated according to the exigencies of the public service. They therefore submitted that the appellant was not entitled to have this train regularly stopped.

In reply, the House relieved the appellant from replying on the questions concerning the trains called the Queen's messenger and the Post Office trains.

Sir *F. Herschell*, S.G.:—After the explanations by the respondents as to the excursion train the appellant would not insist on that train being within the words of the obligation.

Judgment was delivered as follows:—

EARL OF SELBORNE, L.C.:—

The only difficulty with regard to the two classes of trains, which have been called Queen's messenger trains and Post Office trains, that I have felt in this case since it was opened, has arisen from the profound respect which I entertain for those learned judges in the Court of Session who saw their way to a conclusion of which, I must frankly confess, I do not clearly understand the grounds.

The contract with which we have to deal is in general terms. Two acres of land were feued off at a nominal or almost nominal quit-rent, very much less than the value of the land, upon the terms of this contract, and one of those terms was that on that land a station, with all proper accommodation for passengers, should be erected and maintained, and that (because I do not think that what has been called the parenthetical form in which the words occur make the slightest difference) all passenger trains of the company should regularly stop there. Obviously it would be convenient and beneficial to the owner of the adjoining property, Sir James Burnett, the person who granted the feu, that there should be the greatest possible facility of travelling from that station by the company's trains. And if the company entered into this contract, why should a court of law not regard the landowner who stipulated for such a provision, which the company were quite able to accept or to reject according to their view of their own interest? Why should that contract be regarded with more disfavour by a Court of law than any other between parties capable of contracting together which they make when bargaining for their respective interests? There was no compulsion upon either of them; it was perfectly voluntary; there was good consideration given. And if a Court of Law is not to regard the contract with disfavour, why should it so regard the claim of the person with whom the contract has been made to have it fulfilled except so far as he may be disposed voluntarily to dispense on any occasion with its fulfilment? I own I have a difficulty in following some observations in the judgments below, which may or may not have influenced the conclusions of the learned judges, but from which I am bound to express my own dissent.

Then the case resolves itself simply into a question of the construction of this contract with reference to a given state of facts. Are or are not these trains which are called Queen's messenger and Post Office trains, passenger trains within the reasonable meaning of these words? The contract is universal; it says, "*all* passenger trains." If they are, in a sense consistent with the intention of the contract, as that intention is to be gathered from its terms with due regard to extrinsic facts,

H. L. (Sc.) 1885 BURNETT v. GREAT NORTH OF SCOTLAND RAILWAY COMPANY. Earl of Selborne, L.C.

passenger trains, it is quite clear that the company have engaged to stop them unless the holder of this property, the person entitled to the benefit of the agreement, dispenses with it. Now it seems to me that these trains have every possible characteristic of passenger trains, and no characteristic of any other sort of trains. They are advertised in the company's time-tables, and with regard to some of them the form of the advertisement is this: they are not only put down to go at certain times, and stop at certain stations (in one instance I observe that this very station is among them), but the classes of passengers to be carried by them are mentioned, first or third, as the case may be. And in the only case (1) in which there is no entry in the proper column of the time-table of the classes of passengers, there is this note: "Stop where required to set down passengers off the South train," shewing plainly that it is a passenger train, and that passengers are invited and expected to come by it; at all events those arriving from the South. And the limited form of expression, with regard to "passengers off the South train," is explained by the fact, that it would start from Aberdeen in the middle of the night.

Therefore, in truth, these time-tables are the ordinary notice and invitation to all the world that there are such trains, and that passengers may go by them upon the usual and ordinary terms, for there is not the least qualification of the right of a passenger travelling by any one of these trains to be received and put down on the same terms, and with the same advantages, such as carrying luggage, and so forth, in all respects as ordinary passengers are entitled to. In point of fact, the company do carry passengers in that way, and, excepting so far as there is mention of "Queen's Special" at the head of two of these trains in the time-table, there is nothing to inform any single passenger of anything distinguishing these from other trains; and the heading "Queen's Special" informs them of nothing more, than that this train which is to take passengers also answers some purpose under some special arrangement in which Her Majesty has an interest. But there is no inconsistency whatever between a special arrangement in which the Queen has an interest, or a special arrangement for carrying mails for the Post Office, and the fulfilment of that special

(1) The 3.30 A.M. train, headed in the time-table "Queen's special."

arrangement by means of ordinary passenger trains, unless there were something in the terms of the special arrangement to exclude that mode of fulfilling it. There are no such terms in the arrangements here, either as to the Queen's messengers, or as to the Post Office bags; and, in point of fact, the terms are fulfilled by these trains which are, to all practical intents and purposes whatsoever, passenger trains. They are passenger trains entirely under the control of the company—they are passenger trains in which, by the existing contracts, neither the Post Office nor any other authority can forbid the company from carrying passengers. And to say that a train is not a passenger train, which in all other respects is so, because the company may have been led to agree to do something which it can do and does by means of that train, and may have agreed specially to start that train at particular hours, and to keep time in arrival as well as in departure according to a particular table, to say that that makes it less a passenger train is really extravagant; for in every case, so far as the public are concerned, some time has to be fixed. The company may fix their own time ordinarily, and if they agree for a consideration with anybody else to start a train at a particular hour, and that it shall arrive at certain places at particular hours, yet, if they use it as a passenger train, it cannot be less so, because the time is fixed by means of some collateral agreement. To me, therefore, it appears that as to these trains there is no intelligible ground for refusing to the appellant the benefit of the contract.

With regard to the excursion trains I am disposed to think that there are some material differences—I shall state the way in which they strike me, but I shall do it with less fulness, because I do not understand any serious controversy to be raised by the learned Solicitor-General as to those excursion trains when they are run under special advertisements, and are not advertised as running regularly in the ordinary time-tables.

My view is, that there are reasonable grounds for distinguishing these special excursion trains specially advertised from passenger trains in the common popular sense, and in the sense in which I think those words should be understood in this contract. A passenger train primâ facie, I think, is a train advertised to take passengers generally, people travelling from place to place, upon

H. L. (Sc.) 1885 BURNETT v. GREAT NORTH OF SCOTLAND RAILWAY COMPANY. Earl of Selborne, L.C.

the terms and in the manner ordinarily applicable to such passengers. As an illustration, I may refer to the subject of luggage. In the special Act of Parliament of this particular company, as we were informed, there is a provision that a certain quantity of luggage may be carried by every passenger. I may take another illustration from the practice of issuing season tickets (composition tickets as I see they are called on this record) for travellers by passenger trains. Now it is quite certain that the right to carry luggage, applicable to passengers generally, would not be applicable to persons who as a special favour were taken in a luggage or goods train; and we find upon the evidence, with regard to these composition tickets, that they do not give a pass for these special excursion trains, and no luggage is allowed to be taken by them; besides which, people are not carried upon the ordinary terms, either as to payment or otherwise, because every man who goes by such an excursion train must take a return ticket to come back to the starting point, so that he is not a traveller in the ordinary sense of the word, and he cannot claim to get out anywhere except at the place to which he has a pass according to that contract. I am far from saying that arguments of some weight might not be used for the purpose of bringing in even such excursionists as passengers; but upon that point I cannot help observing, that it is conceded that there may be exceptions to the words "passenger trains," in the case of persons who do pass by and are conveyed on the railway, when they have specially hired a train. It was not disputed that if a large number of persons combined together specially to hire a train they would be in the same situation. Now these excursionists do not exactly do that; but I think, taking the whole matter into account together, that it is safe to say, that the parties to this contract had in view, by the term "passenger trains," something different from this class of excursion trains, although they carry passengers.

My Lords, I am not at all disposed to use words in your Lordships' order which would let in unnecessary controversy, as to whether or no the general right of the appellant is evaded by the use of particular words, when in substance there is no sufficient ground for a distinction or exception. The learned Solicitor-General is not unwilling, as I understand, if the House should

think that excursion trains of this kind should be excepted, that they should be excepted by adding these words at the top of page 4 (printed case) (1), after the words, "exclusive use," "and except special excursion trains not advertised as running regularly in the ordinary time-tables of the company;" and I think it much safer to adopt those words than to use the words "special excursion trains" in a more general form, which might let in questions as to what are such trains. I think that when they are not advertised as running regularly in the ordinary time-tables of the company, they are then broadly distinguished from those trains by which the company undertake to carry passengers in the ordinary manner. I cannot help agreeing with what one of your Lordships (2) intimated in the course of the argument, that it is very undesirable to refer in the declarator to particular trains, some of which have been and others may be discontinued, or the times of which may be altered, which would make a reference to them useless; and your Lordships' view of the law applicable to the facts having been sufficiently expressed in the opinions which you may deliver, it will be enough to pronounce a declarator in these words:—[His Lordship read the words of the order, p. 170, and continued:—] I propose therefore to your Lordships to reverse the interlocutor appealed from, and to make that declaration, and with that declaration to remit the case to the Court below. The appellant of course will have the costs of the action and of the appeal.

LORD WATSON:—

The only doubts which I have entertained in this case have arisen from the view which was taken, first by the Lord Ordinary, and then by the majority of the Second Division of the Court of Session. I cannot help thinking that the conclusion at which their Lordships arrived was to some extent affected by the considerations with which they deal in their judgments (3)—considerations which, in my opinion, ought not to influence the construction of the obligation which we have to interpret. The Lord

(1) See words, ante, p. 150.
(2) Lord Bramwell.
(3) 11 Court Sess. Cas. 4th Series, p. 375.

H. L. (Sc.) 1885 BURNETT v. GREAT NORTH OF SCOTLAND RAILWAY COMPANY. Lord Watson.

Ordinary enters at some length upon a consideration of the question whether, apart from the trains in dispute, there is sufficient train service for the traffic of Crathes and its neighbourhood. One of the learned Judges of the majority in the Inner House expresses doubt as to the validity of the obligation (1), and expresses himself in no doubtful terms as to the character of the obligation; and, entertaining these views, it is not matter of wonder that he should have arrived at a conclusion favourable to the respondents. I can only say that I see no reason to doubt that this condition has been validly imposed upon the feuar, and will run with his estate so long as the superior has a legitimate interest to enforce it. And I see as little reason to doubt that it must be dealt with as a fair and equitable arrangement made by parties sui juris in the year 1863, and that it is not open to any imputation of being an unfair or one-sided contract.

Then as to the construction of the words of the obligation, I agree with the Lord Chancellor. The Queen's messenger trains and the Post Office trains, as they have been termed, are simply composite trains, partly for the service of Her Majesty, or of the Post Office, and partly for the service of the travelling public; but the fact that they do accommodate the public, carrying them as passengers from station to station, is quite enough to stamp them with the character of passenger trains within the meaning of this obligation. And in considering whether they are passenger trains or no, it appears to me to be quite immaterial whether the service of the Post Office was added to a train already running for the accommodation of the public, or carriages for the conveyance of passengers were added to a train started for the purpose of carrying the mails. They are serving the purpose of passenger trains, and so long as they possess that character, although they may have other uses and purposes, and although the motive for starting them may not have been the convenience of travellers, it appears to me that they are passenger trains within the meaning of the feu charter.

As to the excursion train, as run in the year 1882 and since, I have formed a different opinion. I should not have held the same

(1) Lord Young. 11 Court Sess. Cas. 4th Series, at p. 386.

opinion with reference to that train as it was advertised to the public in October, 1882. I am by no means of opinion that every train called an excursion train ceases to be a passenger train within the meaning of this obligation, but the circumstances which lead me to think that this is not a passenger train within the meaning of the charter are, briefly, these: In the first place, there is a special arrangement made with each passenger at Aberdeen, differing in its terms from the ordinary contracts made by the company with the travelling public. And, in the second place, the persons who are admitted to travel in that train are collected at Aberdeen, as I understand the facts of the case, and the accommodation provided is simply sufficient to convey them from that terminus to their several destinations up the Dee and back again on the same day, and is not calculated to afford any accommodation to the travelling public.

I concur in the judgment which has been proposed by the Lord Chancellor.

LORD BRAMWELL:—

I am of the same opinion. It seems to me that the defence "before us is so ex facie nimious and unreasonable as to excite prejudice against it, and one has to be on one's guard to see that the exact legal rights of the parties, however unreasonable, are satisfied." In saying this I know I differ as much as possible from the very learned and able Judge whose words I am quoting, and I know the risk I run in so doing. But I feel bound to express my opinion strongly, because I think he has done great injustice to the plaintiff. I cannot but think that the learned Lord has been under the influence he deprecated. I am aware that I may be acted on by this feeling of injustice done.

Let us see what the case is. The pursuer, or his predecessor in title whose rights he has, gave land to this company one may almost say for nothing (that is to say, upon a nominal rent-charge of, I think, five shillings a year), except the benefit of this obligation which the pursuer is now seeking to enforce. I cannot help thinking that if this question had arisen thirty years ago, when the directors who made the bargain with the pursuer's predecessor and the manager then in existence would have had to

H. L. (Sc.) 1885 BURNETT v. GREAT NORTH OF SCOTLAND RAILWAY COMPANY. Lord Bramwell.

decide it, it never would have been a question at all. They never would have made such a point as has been made to-day, because I am satisfied in my mind that they would have known that in fairness they ought not to be setting up such a case as the respondents are setting up now. But Mr. Moffat (1), I think, in one of his letters (to do him justice) states that he had not seen the feu charter until after he had made the contention which had resulted in these proceedings taking place, and I dare say that he and his directors have satisfied themselves in some way that it is a defence which they may properly make and a case which they may properly set up. As I believe it to be bonâ fide I will not call it scandalous, but I think it extravagant.

Now, having made these remarks, I will address myself to the particular question before us, although I protest that I have great difficulty in giving any other judgment than this, that a "passenger train" is a passenger train. The words are not words of art—they want no explanation either by railway people or by experts of any sort or kind. The question is whether these are passenger trains. The answer is they are passenger trains, and to my mind they are passenger trains that carry passengers in the ordinary way upon the ordinary terms, except the excursion trains, as to which I will say a word or two presently.

It seems to me that the difficulty has arisen from a mistake—partly, I must say with great respect, as I think, from a prejudice. Possibly it may be said in return that I am labouring under a prejudice in the opposite direction, and I may be, though I think not. It seems to have arisen partly from that, and partly from a notion that things not specifically within the contemplation of the parties to an agreement ought not be held to be within the effect of it, which to my mind is a very great mistake, a mistake illustrated by the case I mentioned in the course of the argument, the case of the telephones. They were held to be within an agreement which had been made at a time when telephones were not known—they were held to come within general words which the prudence of people had put in for the purpose of providing for something which might arise at a future time. That seems to be one origin of what I think the mistake. Another cause of it

(1) General manager of respondents' railway.

(I say it with sincere respect for the learned lord of session, Lord Young, who seems to rely upon the point so much) is the notion that because a passenger train running regularly comes into existence, if one may so say, under the special circumstances of a bargain either with the Home Office, or with the Post Office, therefore that train—I was going to say although a passenger train—brought into existence under those particular circumstances is not a passenger train within the agreement. I cannot see the reason of that. I can only say I do not agree. I do not see why it should be so.

Now, one word with respect to excursion trains. One knows perfectly well what is meant in practice by an excursion train. It is a train which like others goes from one place to another, it may or may not stop and pick up passengers on the road. I believe it commonly picks them up, but it is a train which goes from one place to another with a view to people getting to that other place on cheap terms and very frequently upon the condition that the railway company are not to be delayed or inconvenienced by people taking luggage with them. But why is that not a "passenger train"? Passengers go by it, and they go by it from one place to the other in order that they may get to the other place. It is not the less a passenger train because they pay a small fare; nor is it the less a passenger train because by agreement with the company they do not carry luggage with them. It seems to me really that the substance of the thing is that; as I said before, passenger train is not a term of art, it is a popular expression, and these popularly speaking are passenger trains, and no reason has been given why the words should have any other than their natural meaning. As to the pound of flesh argument (1), the judgment is not that the appellant should have none, but about three-quarters of his pound. His right is to all; whether as a reasonable man he should exact all, is another matter.

LORD FITZGERALD:—

The judgment of your Lordships' House is invited on the construction of a portion of the feu charter of 1863, in which the

(1) See Lord Young's opinion, 11 Court Sess. Cas., 4th Series, at p. 386.

H. L (Sc.) 1885 BURNETT v. GREAT NORTH OF SCOTLAND RAILWAY COMPANY.

Lord FitzGerald.

language used is very general. It is open to us, and I should say necessary for a just conclusion, to consider the relation of the parties to each other before the feu charter was executed, so as to ascertain what the parties had in view and intended, and to limit the general words if necessary to what is fit and just.

There was a prior deed of agreement of 1853, made with the pursuer's predecessor, which is still in force, and it is observable that the feu charter of 1863 is made expressly "without prejudice to that deed of agreement." By that agreement the company (the defenders) undertake to make certain accommodation works, and "inter alia," by clause 9, that "a siding shall be made at the level crossing marked number $\frac{46}{a}$ on said deposited plans, for the accommodation of the proprietor and tenants of the said estate of Leys; and the said company hereby undertake that any of the passenger trains shall be stopped at said siding, although not appointed by the company's time bills so to do, on a preconcerted signal, to be arranged by the company with the proprietor of said estate, being shewn, so as to take up or set down any passengers proceeding from or to Crathes at said siding." If it was necessary now to interpret that provision, speaking for myself, I would probably say that it applied to each and every train coming within the ordinary description of a passenger train, and that the obligation on the company was to stop each of such trains at the siding on the preconcerted signal. In other words the Crathes siding was a signal station, at which, when there were passengers to take up or set down, the company was bound on signal to stop each one of its passenger trains. The position of things was probably found to be inconvenient, and not free from danger, and it became desirable to provide a station with all its conveniences in place of an unprotected siding, and relieve all parties from the cumbrous necessity of signalling.

That being the state of things, we have now to look to the feu charter of 1863, the main object of which, as well as its consideration, was the obligation on the company "to erect and build upon the ground hereby disponed a station of the said railway for passengers and goods, containing the accommodation after mentioned (which station will be of advantage to me and my tenants in the estate of Leys, Crathes, and others, as well as

to the public at large)," and the stipulated obligation was that "the said railway company shall be bound within twelve months from the date of these presents to erect, at their own expense, on the said piece of ground first above mentioned, a station for passengers and goods travelling by the said Deeside Railway, at which all passenger trains shall regularly stop, to be called the Crathes Station, containing a suitable waiting-room, covered passenger shed, platform, and all proper accommodation for first-class and other passengers, and to maintain such station in all time coming; it being hereby provided and declared that the said railway company shall be bound to have a signal-post erected at the said station, on which a signal visible from Crathes Castle shall be displayed whenever any passenger or parcel for Craithes shall arrive at the station." There are other accommodation provisions, but they are all confined to the requirements of the station. Then comes the irritancy clause for forfeiture of the right for breach of the feudal contract, but it is unnecessary to advert to it as it has been disposed of in the course of the argument.

The pursuer contended below, as he has insisted here, that by the stipulation "at which all passenger trains shall regularly stop," there is created an absolute obligation on the company to stop at the Crathes Station each and every of all the passenger trains that pass along the line. The defenders on the other hand have always admitted that they are bound to cause all passenger trains running on their line for the ordinary service and traffic of the district to stop at Crathes.

I have been at some loss to understand the meaning or extent of this admission on the part of the defenders and rather turn back on the real question: What is a passenger train? It would seem to me that every train of the company over which the company retains its general control and dominion, and by which the company professes or offers to carry for hire in ordinary course such travellers as may take advantage of it on payment of their fares, is within the meaning of the stipulation in controversy a passenger train. It may be a special, or it may be an express train, it may carry the mail, or a Queen's messenger, or even excursionists, but it does not follow that it is not also a passenger train.

H. L. (Sc.) 1885 BURNETT v. GREAT NORTH OF SCOTLAND RAILWAY COMPANY. Lord FitzGerald.

I am, my Lords, of opinion that in the construction of the obligation in question "all passenger trains" is to be interpreted as meaning "each and every passenger train," and as embracing the trains in controversy, save the special excursion trains which are run subject to special and peculiar conditions, and are not intended for ordinary travellers. It may be that the obligation assumed by the company was not wise or prudent on their part, but that is not for our consideration. It was not illegal or unreasonable on the part of the pursuer to insist on the stipulation for the benefit of himself and his tenants. We have but to interpret and give effect to the plain meaning of the language used. If inconvenience or injury may arise to the company from the enforcement of their contract, they have ample means within their reach to protect themselves.

That the said interlocutors complained of in the said appeal, be and the same are hereby reversed: And it is declared, that the defenders (respondents) are bound regularly to stop at the station called "Crathes," on the line of railway belonging to the defenders (respondents), between Aberdeen and Ballater, for the purpose as well of taking up as of setting down passengers, all trains now and hereafter passing through the said station for the conveyance of passengers, except only such trains as may be hired by an individual or individuals for his or their exclusive use, and except special excursion trains not advertised as running regularly in the ordinary time-tables of the company: And with this declaration, it is ordered, that the said cause be remitted to the Court of Session in Scotland to do therein as shall be just and consistent with this judgment: And it is further ordered, that the respondents do pay or cause to be paid to the appellant the costs of the action in the Court of Session: And it is further ordered, that the respondents do repay to the appellant the sum of £187 16*s.* 4*d. paid by him to them on the* 4*th of*

H. L. (Sc.) 1885 BURNETT v. GREAT NORTH OF SCOTLAND RAILWAY COMPANY.

April, 1884, *in name of costs, and* £1 2*s.* 4*d. paid by him to them on the 9th of April*, 1884, *in name of dues of extract of the action in the Court of Session: And it is further ordered, that the respondents do pay or cause to be paid to the appellant the costs incurred in respect of the said appeal to this House.*

Lords' Journals, 24th February, 1885.

Agents for appellant: *Martin & Leslie, for Edmonds & Macqueen, Aberdeen.*

Agents for respondents: *Dyson & Co., for Gordon, Pringle, Dallas, & Co., W.S., Edinburgh.*

d. CLIFFORD *v.* CLIFFORD, 1 All E.R. 394. | *Applied.* CLIFFORD *v.* CLIFFORD. [1948] P. 187 | *Applied.* W. *v.* W. [1952] P. 152

[HOUSE OF LORDS.]

H. L. (Sc.) 1885 *March* 5.

G. (THE HUSBAND) . . . . . APPELLANT;

AND

M. (THE WIFE) . . . . . RESPONDENT.

Nullity of Marriage—Impotence of the Man—Want of Sincerity as a Bar to the Action—Canon Law—Triennial Cohabitation—Scotch Law.

In a suit for nullity of marriage on the ground of impotency, there may be facts and circumstances proved, which so plainly imply on the part of the complaining spouse a recognition of the existence and validity of the marriage, as to render it most inequitable, and contrary to public policy, that he or she should be permitted to go on to challenge it with effect; but the doctrine, designated as the "doctrine of want of sincerity" in an action of this kind, has been too much extended in recent English decisions, and that doctrine, apart from "approbate" and "reprobate," has never been recognised by the law of Scotland.

Delay in raising a suit of nullity on the ground of impotency is a material element in the investigation of a case which upon the facts is doubtful; but there is no definite or absolute bar arising from it.

The Canon Law rule of triennial cohabitation has not been recognised in England beyond this point, that where a husband or a wife seek a decree of nullity propter impotentiam, if there is no more evidence than that they have for a period of three years lived together in the same house and with ordinary opportunities of intercourse, and it is clearly proved there has

H. L. (Sc.)
1885
G.
v.
M.

been no consummation, then if that is the whole state of the evidence, inability on the part of the one or of the other will be presumed. On the other hand, the presumption to be drawn from the fact of non-consummation after three years' cohabitation is capable of being rebutted. And, also, every case need not be fortified with the presumption; for although no presumption can be raised from the absence of consummation within a less period than three years, yet positive evidence may be given, from which the same inference of inability may be drawn. See Lord Watson's opinion (p. 198), that to this extent the Court of Session would not hesitate to adopt the rule.

G. and M. were married in 1877. They slept in the same bed for about nineteen months, but during only two months and a half of that time did G., the husband, make any attempt to consummate the marriage. He desisted on account, he alleged, of his wife's increasing coldness and repugnance to him. It was admitted that the marriage had never been consummated. In 1879 the parties finally separated, the wife living on her own income with her relations, the husband not giving anything towards her support. In 1882 the wife gave birth to a child of which G. was not the father. G. instituted an action for divorce which M. defended, and she then raised this action of declarator of nullity of marriage on the ground of G.'s impotence. G. denied his impotence. He was personally examined, and the medical evidence was that no malformation was apparent from his appearance:—

Held, affirming the decision of the Court below, that M. was not barred personali exceptione from insisting in this action; and that G.'s impotence had been proved:

Practice—Appeal—Bankruptcy.

Where an appeal involves a question of the appellant's status, the House will allow it to be proceeded with notwithstanding the bankruptcy of the appellant.

APPEAL against a judgment of the Second Division of the Court of Session, Scotland, pronounced in an action of declarator of nullity of marriage by reason of the impotence of the man. W. G., the appellant, and I. W. M., the respondent, were married in Bombay, on the 29th of November, 1877. They resided together in India until December, 1878, when the appellant resigned his position there, and came to Scotland. In Scotland they lived with the wife's relations till the 29th of June, 1879, on which date the appellant left the respondent; and up to the commencement of these proceedings they had never met. At the date of the ceremony of marriage the man was about forty-nine and the lady twenty years of age. The lady was an orphan, and having accompanied her uncle and aunt to India, met and became

attached to the appellant, and although her uncle was against the union, she persisted, and it took place.

It was admitted by the parties that the marriage never had been consummated; and that from some short time before the 14th of February, 1878, no further attempt was made, notwithstanding the fact that the spouses, with the exception of a few days, continued to sleep in the same bed down to their final separation. From the final separation on the 29th of June, 1879, the appellant contributed nothing to the support of the respondent, nor did he offer her a home supplied by him. In September, 1879, he wrote her a letter addressed from his brother's house, offering to return to live with her if she would promise to treat him with proper respect. To this letter the respondent did not reply. On the 18th of October, 1882, the respondent gave birth to a child, of which the appellant was not the father. On the 23rd of March, 1883, the appellant commenced proceedings for divorce against the respondent on the ground of her adultery. She defended the action, and while admitting the birth of the child, averred that there was no valid marriage between her and the appellant, in respect that he was impotent at the date of the ceremony. And on the 13th of April she raised this action concluding for declarator that "the defender was, at the time when the pretended marriage between him and the pursuer was entered into, and still is, impotent, and unable to consummate marriage by carnal copulation; and that the pretended marriage betwixt the pursuer and defender was from the beginning, is now, and in all time coming shall be null, and of no avail, force, strength, nor effect, with all that has followed thereon," &c. The appellant averred his potence.

By the marriage settlement the respondent's private fortune of £5000 was handed over to trustees for the benefit of the marriage; and under it the appellant was entitled, in the event of his surviving the respondent, to the interest of the fund so long as he remained a widower. On the other hand, the appellant under the settlement insured his life for £1000, and bound himself to keep up and pay the premiums thereon; but in fact the premiums were paid by the trustees out of funds derived from the wife's property.

H. L. (Sc.) 1885 G. v. M.

In October, 1882, negotiations were opened by the trustees with the appellant for the purpose of having the policy of insurance surrendered, and the value handed to them. But the respondent refused her consent, considering she would have lost by the transaction; the price offered for the surrender being much less than the amount paid in premiums. Subsequent to the proceedings for divorce, the trustees sued the appellant for repayment of the premiums and costs amounting to a sum of £188 0*s.* 1*d.*, and threatened him with sequestration unless they were paid.

The appellant's action for divorce, and the respondent's action for declarator of nullity came before the same Lord Ordinary (1), and his Lordship sisted the appellant's action until the decision of the action of declarator (2). This interlocutor was not appealed from.

On the 17th of January, 1884, the proof allowed was adduced. In addition to the facts narrated above the evidence was substantially as follows:—

The appellant examined, speaking of his failure during the marriage trip, said he attributed it to nervousness and his comparative weakness of health at the time. During the marriage trip there was no appearance of coldness or change of demeanour on the part of his wife. When they returned to Bombay, it was the season, and his wife went to a good many balls and made violent love to more than one person. What took place at the Byculla ball (14th of February, 1878) was the culminating point. He spoke to his wife quietly but severely. She defied him at first to interfere in any way, but afterwards to a certain extent

(1) Lord Kinnear.

(2) 11 Court Sess. Cas. 4th Series, 1060. His Lordship after commenting on *Guest* v. *Guest*, 2 Hag. Con. Rep. 321; *Taverner* v. *Ditchford*, 31 L. J. (Mat.) 105; *M.* v. *B.*, 33 L. J. 205; *Castleden* v. *Castleden*, 29 L. J. 81, and 4 Macq. 160, said: "The result is that the action of declarator should have precedence of the action at the instance of the husband. There would be no advantage in allowing both to proceed simultaneously, as in counter actions of divorce, because, while decree of divorce may be given at the same time in each of such actions, it is not disputed that in the present case a decree for the pursuer in either action would entirely extinguish the other. But further, it is plain that if there be no marriage there can be no adultery, and the pursuer is therefore well founded in her contention that the alleged adultery ought not to be made the subject of judicial investigation until the validity of the marriage which she contests has been determined. This will not affect the defender's right to lead such evidence of the pursuer's conduct as may be competent in support of his plea that the present action is barred."

H. L. (Sc.)
1885
G.
v.
M.

was humbled. In the month of January, 1878, there were days at a time when she never spoke to him. After February (before the Byculla ball), she proposed they should occupy separate beds. They continued to sleep apart, and then they went on a visit to Kurrachee. In January, he had tried to have connection and found he was not sufficiently strong, and again he tried towards the end of that month, but when he was about to have connection gradual weakness came on and failure. Before they went to Kurrachee, he said to his wife: "This is a miserable life to lead, and is it to go on for ever?" "You had reason to complain at the beginning of our marriage, but things are altered now," and he asked her to be friends. She said: "It is better as it is." From that time forward she never received an advance by way of caress or kindness from him in a cordial way.

When they went to Kurrachee, there was a room set apart for them, in which there was but one bed. She refused to sleep with him on the night of their arrival. He slept that night on the sofa. The rest of the time they slept together, he insisted on that, as he said he would not sleep on the sofa, but he said he would not touch her. He said that because the previous evening when she so decidedly said she would not sleep in the same bed with him, he said again "Cannot we make this matter up" &c., "If we were friends we might have a child and things would go better." She said in the strongest way that if she had a child she would hate it, and that she would not sleep with him. When he spoke of having a child he believed his capacity had improved, and that he could have done his duty as a husband. At Kurrachee he made no attempt, nor ever afterwards, because her whole conduct to him was repeatedly antagonistic, insulting and disagreeable; it was the very last thing he would have thought of. He never heard until this action was raised that she complained of his failure of duty. Dr. Sidney Smith came to know of his failure and gave him some prescriptions which he did not take, because at that time his wife's conduct had done away with all affection for her.

Cross-examined:—He never had connection with his wife or with any other woman before or after his marriage. His wife was a very handsome young woman. As a boy he had been addicted to a vicious practice, but did not continue it after fifteen years of age and the practice then entirely ceased. Even after there was a coldness between him and his wife, she did not repel his advances. He never approached her or tried to have connection. It was impossible for him to say when or where he offered to make it up with her, but she would not let him embrace or kiss her.

The respondent examined:—She had become attached to the appellant. On the first night after the marriage he made only one attempt to have connection with her. He made later other attempts. She never resisted him in any way. All the remark he made was that he was nervous. From the time they returned to Bombay from the honeymoon till they left for Kurrachee the appellant endeavoured to have connection with her at intervals of two or three nights, but he never succeeded. The last time the appellant attempted to have connection with her was in February—not after the night of the Byculla ball. He never asked her to let him try again, or did anything to indicate that he was desirous of trying again. She did not think she was willing just at first after the ball to have allowed him to attempt to have connection, because she had got a

H. L. (Sc.)
1885
G
v.
M.

dislike to him owing to the treatment she thought she had received from him. He never afterwards told her he was changed in his physical condition. They slept together when they arrived in Scotland until June, 1879, and all that time the appellant never attempted to have connection or proposed such a thing to her. When they arrived in Scotland her feelings towards the appellant had changed, she had ceased to have affection for him. Just before the Byculla ball she desired to sleep alone because of the heat. The appellant did complain to her that she was changed to him. At Kurrachee she refused to sleep in the same bed with him, because they had been occupying different beds. Her feeling of dislike to him was growing. She was very determined the first night at Kurrachee she should not sleep with him. All the other nights they slept in the same bed. He insisted on sleeping with her contrary to her wish.

Cross-examined. She began to feel the first coldness for him in January. She was fond of gaiety. At the Byculla ball, the appellant accused her of flirting with one gentleman. In the beginning of February she did not like her husband, and she was afraid she shewed her dislike by speech and action. The coldness between them never disappeared. When in Scotland she did not treat her husband any better than she had before. She never made any complaint to any one of her husband until she was asked by a lady (with whom she then resided) after her husband had left her. She raised the present action because of the action brought against her, as she thought her husband was not blameless altogether, and that she should not bear both his share of blame and her own: she also wished to be free. She saw her law agent about the cause of her husband leaving her. She thought she gave him to understand that her treatment of her husband had arisen from his failure to consummate the marriage. The raising an action against him on that ground was spoken of.

Her law agent, in his examination, said the respondent told him that the usual intercourse had not taken place, and that it was her husband's fault. He obtained an opinion from counsel. Undoubtedly the respondent's unmarried sisters' interests, and the publicity of an action such as this, affected largely the consideration for leaving the thing over.

Three doctors were examined for the respondent and two for the appellant. The evidence of those for the respondent was substantially as follows:—Dr. Joseph Bell said he examined the appellant and found him a well formed, healthy looking man. His sexual organs well formed, but flabby. Vicious practice tends to the premature exhaustion of the sexual organs. The appellant had an erection on each of two unsuccessful attempts, and an emission on the second, that was just the common case, insufficient erection and a too early emission. That is what they mean by impotency, where the organs are properly formed. Cross-examined. He believed if the appellant was encouraged, and had plenty of time and was not nervous, and if a little champagne were given him beforehand, he might succeed with any other woman; but after his failures it would be more difficult with his wife.

Dr. Angus Macdonald said the opportunities recorded in the evidence were far too numerous to account for the failure without a distinct defect in virile power. The worst cases of impotence in the male were where they found transient erections with emission before there is time for penetration.

Dr. Keiller said he was strongly of opinion from the evidence, and the fact of

the appellant's age, his continence, and his former vicious practice that permanent impotency existed. Cross-examined. He had known cases where attempts at consummation had been made for months before complete success.

Dr. Gardner examined on behalf of the appellant, said he believed the appellant was incapable at the date of his marriage to the extent he himself confessed; but his belief was that if the lady had given him proper opportunities, he would have come to it after a limited time. It was not at all unusual for a man to fail within the first few weeks of his marriage, and it was especially likely to occur where a continent man marries late in life. Dr. Gillespie gave a somewhat similar opinion.

Dr. Sidney Smith, examined by commission for the pursuer, said the appellant told him he had failed. He prescribed for him. He saw him on the 31st of January, and also on the 18th and 23rd of February, and also on the 25th, 26th, and 27th of March, 1878. He asked him on one of these occasions whether there was any reciprocity on the part of his wife, or whether he got the "cold shoulder." He said certainly, she would not allow him to come near her. On another occasion he said to the appellant, how were they to know whether the medicine was doing him any good, if there were no means of proving it. He also suggested to the appellant that there was probably some disappointment on the part of his wife, which, if he exercised a little tact might pass off. As far as he recollected, the appellant told him that whenever he did make an attempt to consummate the marriage there was no result. Subsequent to the 25th of February, the appellant told him that his wife would not have him come near her.

On the 24th of January, 1884, the Lord Ordinary held that the respondent had failed to establish her case, and his Lordship assoilzied the appellant from the conclusion of the action. The respondent having reclaimed, the Lords of the Second Division on the 4th of June, 1884 (Lord Rutherfurd Clark dissenting) recalled the Lord Ordinary's interlocutor, and declared in terms of the conclusions of the summons.

The appellant lodged an appeal to this House, and subsequently presented a petition that his appeal might proceed in ordinary course notwithstanding his bankruptcy. On the 13th of November, 1884, the appeal committee allowed the prayer of the petition on the ground that the appeal involved a question of the appellant's status.

March 2, 3, 5. *Davey*, Q.C., and *Robert Wallace* (with them *R. L. Wallace*), contended that the decision of the Court below was erroneous. The respondent by her own statement became aware of the appellant's alleged impotence immediately after the marriage; yet from that time to the separation she never

H. L. (Sc.) 1885 G. v. M.

complained to any one. After the separation, it was only mentioned in answer to a question. In 1879 the respondent was made fully aware of her legal rights, but she did not think fit to prosecute them. She now, however, came forward, and relied on her alleged grievance in answer to an action for divorce. Also she appeared to have made up her mind to abide by the marriage. For so late as October, 1882, she refused to surrender the policy of insurance, and she continued to go by the appellant's name. Such conduct proved that the action was prosecuted for a side motive, and not for the single purpose of getting rid of the disappointment resulting from the alleged imperfections. This was exactly what the English cases laid down as "want of sincerity," and as fatal to the suit. These cases also settled that delay in prosecution rendered it necessary that the evidence of absolute impotence should be of the clearest character.

In *Guest* v. *Guest* (1) the husband called on the wife to answer in a suit of nullity of marriage by reason of impotence by malformation in her person, Lord Stowell refused to allow the merits to be gone into, because the husband in a previous suit brought by the wife for divorce by reason of adultery, against him, acknowledged the marriage, and Lord Stowell held that his conduct on that occasion might be considered as an admission that there was no such impediment to the marriage; Lord Stowell also "said the length of time which has elapsed (seven years) is, in itself, almost a bar."

In *Briggs* v. *Morgan* (2) the parties were married early in 1818, the wife being then a widow of fifty years of age—the man forty-two. The woman had lived with a former husband eighteen

(1) May 5, 1820. 2 Hagg. Cons. 321, at pp. 322, 323. In his judgment Lord Stowell said: The marriage took place in 1813. The wife possessed a fortune of £14,000, "of which £10,000 was property reserved to herself. In the quality of her husband, under the marriage settlement, he has had the use of £4000, which furnishes a pretty strong inference that there is no such objection to the marriage as is now stated; since it is only in the character of a lawful husband that he could entitle himself to the use of this money." It appears from a note to the report, p. 322, that in 1816 the wife brought a suit of adultery against the husband, and an issue was given confessing the marriage, otherwise denying the adultery. Sentence was given for the wife, and there was no appeal.

(2) Nov. 24, 1820. 2 Hagg. Con. Rep. at p. 330.

H. L. (Sc.)
1885
G.
v.
M.

years. In March, 1820, the husband brought a suit for nullity of marriage by reason of malformation, and the libel given in sixteen months after the marriage pleaded "defect incurable, as by inspection of matrons will further appear." Lord Stowell refused to put the woman on her trial, and said, "The age of the man is not much a subject of observation, except that it is beyond the octavum lustrum at which an experienced writer describes the passions to be in a state of greater composure; at any rate, it is an age at which the disappointment on that account may be presumed less grievous, especially in the case of a marriage to a woman older than himself. This is not the only symptom of insincerity in the present complaint. There is the delay of sixteen months, which is not easily accounted for, in a case in which the proof of continued cohabitation is not required, for in a case of actual malformation no such proof is required."

In *B—n* v. *B—n* (1), nullity of marriage brought by the husband by reason of the alleged incurable malformation of the wife. The marriage took place in 1835, and the parties cohabited in the East Indies until 1840. In that year the lady came to England and consulted doctors as to her aptness for sexual intercourse. In 1844 she was joined in England by her husband, and they cohabited. In 1847 the husband returned to India. In 1852 he commenced these proceedings. Dr. Lushington, who delivered the judgment of the Privy Council, said (2): "The law affords a remedy to those who are really aggrieved and sensible of the grievance, and then only vigilantibus non dormientibus. The remedy is given on account of the loss sustained and the evil felt; not to promote or assist other purposes having no relation to it. If the husband is silent for so long a period, unaccounted for, that the presumption would necessarily arise that he acquiesced in the consequence which such an unfortunate connection entailed upon him, he could hardly be entitled to say, 'Give me a remedy for a grievance I have not felt,' and that to the detriment of another. Their Lordships are all of opinion that cases might occur where long acquiescence with knowledge, or the means of procuring knowledge, would operate as a bar to

(1) Feb. 25, 1854, in the Privy Council, 1 Spk. Ecc. & Ad. 248; 2 Rob. Ecc. Rep. 580.

(2) 1 Sp. Ecc. & Ad. Rep., at p. 260.

H. L. (Sc.) 1885 G. v. M.

the prosecution of such a suit, and more especially if the circumstances shewed that the suit was brought, not on account of the evils resulting from such imperfection, but for other and different reasons."

In *Castleden* v. *Castleden* (1) the petition filed in 1858 set forth that on the 16th of December, 1834, the petitioner, then a spinster aged eighteen, was married to the respondent then thirty years of age, and that he was at that time incompetent. The respondent did not appear. The petitioner lived with the respondent until 1838; she subsequently maintained herself. In 1854 proceedings were taken against the husband for payment of her debts. He then made her an allowance, but in 1858 he threatened to reduce it. The suit was then brought. Williams, J., and the Judge Ordinary (Bramwell, B., dissenting), were of opinion that the proof of incompetency was not so complete and perfect as it ought to have been, considering the number of years between the marriage and the institution of the suit. Lord Campbell in this House said, "Lapse of time coupled with that indirect motive" (that he had ceased to support her) "is considered of itself an absolute bar."

[EARL OF SELBORNE, L.C.:—The foundation for the judgment there was that the evidence was insufficient after such a time.

LORD BRAMWELL:—I considered that was a very hard case.]

In *E.* v. *T. falsely called E.* (2) a delay of eleven years was explained; but the Judge Ordinary said, "The Court interferes to relieve the petitioner from a real grievance, and the presumption is, that if the alleged grievance is borne with for a long time, the application is not bonâ fide, but is made for some side purpose." In *M. falsely called C.* v. *C.* (3), Lord Penzance said, "Relief in suits of this nature is never accorded by the Court unless the petitioner be prompt in seeking it, and sincere in the motive for doing so. The failure of proof on the issue of fact makes it needless to enlarge on these two conditions in the present case. But I cannot hesitate to say that if the petitioner was, as she alleges, made cognizant within four or five years after her marriage of her husband's impotency, she could not delay these

(1) April 11, 1861. 9 H. L. C. 186; 4 Macq. 160; 29 L. J. (Pro. & M.) 81.

(2) Nov. 18, 1863. 3 Sw. & Tr. 312.

(3) Mar. 2, 1872. Law Rep. 2 P. & D. at p. 419.

H. L. (Sc.) 1885 G. v. M.

proceedings for three years more without being open to the charge of a want of sincerity or promptitude. The general circumstances of each case, and the facilities of the party aggrieved for obtaining legal advice and assistance, will vary indefinitely, but the conditions to which I have alluded mean nothing if they do not mean this—that the petitioner is bound to have evinced impatience under a sense of wrong, and a reasonable activity in complaint and redress." And, in that case in this House, the Lord Chancellor (1) said, "To open the door to lax and easy declarations of matrimonial nullity would be a grave public mischief; and it is therefore imperative to proceed only upon strict and thoroughly satisfactory proof."

In *W.* v. *R.* (2), all the previous cases were examined, and Sir R. Phillimore said, "The law has always required sincerity in the complainer, that is, a real sense of the grievance complained of unmixed with any other subsidiary motive, and as a necessary proof of such sincerity has also required all reasonable promptitude to be exhibited by the complainer in seeking legal redress."

The authorities on the question of "sincerity" were English, but they were equally applicable to a Scotch appeal.

The parties occupied the same bed nineteen months, but admittedly only during two months and a half were attempts made at consummation. Impotency ought not to be inferred from non-consummation for such a short period. The Canon Law required three years' cohabitation if no apparent malformation (3).

(1) Lord Selborne. *Cuno* v. *Cuno*, Law Rep. 2 H. L., Sc. 300.

(2) 1876. 1 P. D. at p. 408.

(3) Dec. lib. 4, tit. 15, C. 5. Laudabilem. Sollicite quoque ad ultimum Requisisti, quantum tempus indulgendum sit naturaliter frigidis ad experientiam copulae nuptialis, in qua si defecerint separantur. Nos vero, quamvis in antiquis tam canonibus quam legibus super hoc diversa tempora concedantur, id tamen in præsenti consultatione sentimus ut, si, naturaliter frigidus non potest illa, quam duxit, uti pro conjuge, a tempore celebrati conjugii, si frigiditas prius probari non possit, secundum authenticum legale cohabitent per triennium. Quo elapso, si nec tunc cohabitare voluerint et juxta decretum Gregorii mulier, si per justum judicium de viro probare potuerit, quod cum ea coire non possit, accipiat alium; si autem ille aliam acceperit, separentur. Quod si ambo consentiant simul esse, vir eam, et si non ut uxorem, saltem habeat ut sororem: Corpus Juris Canonici, Richter, p. 680. See Ayliffe's Parergon of date 1726, p. 227. See also Poynter on Marriage, p. 60; Sanchez, lib. 7, dis. 111. Civil Law: de Impotent, nov. 22, tit. 6; nov. 117, c. 12, and compare Code 5: 17: 10.

H. L. (Sc.) 1885 G. v. M.

In *Welde* v. *Welde* (1) the lady was virgo intacta. The doctors reported that the husband had all the parts of generation in due and proper proportions. Dr. Bettesworth said "three years' cohabitation is in these cases required by law; the parties have been married three years, but a great part of that time have been absent from one another, but a triennial cohabitation is so requisite that if the parties were necessarily absent the man is to be restored as to that time during which he has been absent. It is necessary that it should appear to the Court not only that Mr. Welde was impotent, but that he is so now; for where there is a probability of capacity, the Court cannot separate parties," and the Court decreed the lady to return to cohabitation.

In *M. falsely called H.* (2) the Judge Ordinary, Lord Penzance, after mentioning the two cases in Robertson's Reports, pp. 614, 625, said, "Subject to these exceptions, there is a well known and valuable rule, debated of old time for the guidance of the Court, that impotence shall be presumed after three years ineffectual cohabitation, and shall not be presumed before. The rule ought therefore to be applied": see also *S. falsely called E.* v. *E.* (3)

In *S.* v. *A.* (4) Sir James Hannen said: "The law has indicated what is a reasonable time in requiring three years' cohabitation, by which is meant that three years is a sufficient time to ascertain whether it is a mere coyness on the part of the woman, or whether there is any physical incapacity.

In *B——n* v. *B——n* Dr. Lushington said: "If indeed the incapacity be propter frigiditatem the law requires before such a suit be commenced a sufficient cohabitation to establish the fact" (5).

[Lord Watson referred to *F. falsely called D.* v. *D.* (6), where Lord Penzance said this rule (as to triennial cohabitation) only applies when the impotence is left to be presumed from continued non-consummation; for when the impotence is clearly proved aliunde, the Court has never resorted to it.]

If there is a doubt, both spouses appearing, there must be the three years' cohabitation. Wallace's Prin. Law of Scotland,

(1) 1731. 2 Lee, at p. 585.
(2) July 12, 1864. 3 Sw. & Tr. 517, at 522; see also 33 L. J. (Pro. & M.), at p. 160.
(3) 3 Swa. & T. at p. 240.
(4) May 29, 1878. 3 P. D. at p. 75.
(5) 1 Spink's Ecc. & Ad. at p. 260.
(6) 1865. 4 Sw. at p. 94.

published in 1760, p. 227, says: "If one who is really impotent appears to be like other men and labours under a latent disease, his debility, however real it may be, is no cause of an immediate declaration of the nullity of the marriage. Some time must be expected ere it can be annulled. Both the civilians and the canonists make this to be three years."

[LORD WATSON:—I have never heard that book cited before.

EARL OF SELBORNE, L.C.:—Dr. Lushington, in *A. falsely called B.* v. *B.* (1), said: "In Scotland there is no fixed period for cohabitation. In former times, indeed, it was three years, but the Courts now require that that shall be a sufficient cohabitation, according to the circumstances, to test the impotency."]

The two cases of Dr. Lushington in 1 Spinks, Ecc. & Ad. 12, and 2 Robert. Reports, at pp. 614, 625, presented independent circumstances: not in the least similar to those here; and notwithstanding these decisions Lord Penzance recognised the triennial rule as satisfactory, and as still in existence.

The medical evidence had failed. None of the doctors went so far as to say the appellant was actually impotent. The rest of the evidence was most unsatisfactory. On the respondent rested the onus of proving her husband was impotent. She admitted she shewed a repugnance to him early in January, which increased later on. The character of the appellant was that of a nervous bashful man, of delicate feeling, quiet and retiring, and it may be with want of passion and want of will, and therefore more easily repelled than a man of more violent temperament; but this was not impotency.

[LORD WATSON:—Dr. Brodie said in *M.* v. *N.* (2) the fault may be in the woman from malformation or resistance; but if it is not in the woman, it must, in the case of non-consummation, be in the man, who may be nervous, or have some internal defect, even if there is no defect outwardly.]

If the wife by coldness continued day and night caused the husband to surrender attempting to consummate, that is not enough. The respondent cannot create by her conduct the right to a declarator of nullity.

(1) 1853. 1 Sp. Ecc. & Ad. at p. 16; 2 Rob. 625. (2) 2 Rob. at p. 629.

H. L. (Sc.) 1885 G. v. M.

[Also commented on *Lewis* v. *Haywood* (1); *Sparrow* v. *Harrison* (2); *Scott* v. *Jones* (3); Fraser's Husband and Wife (2nd Ed.), p. 100; *U——n falsely called F——s* v. *F——s* (4); *Bury's* (5); *L.* v. *L.* (6).]

Sir *F. Herschell*, S.G., and *Jameson*, appeared for the respondent, but were not called upon.

EARL OF SELBORNE, L.C.:—

In this painful case some questions of law, which are of importance in this sense, that if they could be established they would be important, have been argued as constituting a bar to the treatment of the question as one simply of fact depending upon the particular evidence in the particular case. My opinion is that no law which can have that effect has been shewn to exist in Scotland.

Now the two points mainly insisted upon were derived, so far as they went, from the English, or partly from the English and partly from the Canon Law authorities. And the first observation which I make is, that if there be positive rules of law upon which an exception to the trial of an action of this kind upon its merits can be founded, they must be proved to exist and to be recognised as positive rules in the country in which the action is brought. Neither the doctrine which in the language of some of the cases may be described as the doctrine of "sincerity" on the part of the pursuer in an action of this kind, nor the doctrine of the necessity of triennial cohabitation, assuming those doctrines to exist and to be rules of positive law, in the sense suggested by the appellant's counsel, in England, is proved to be recognised by the law of Scotland, or to be a rule of positive law in Scotland, from which country this appeal comes to the House.

That might perhaps be enough to dispose of all that has been said upon those subjects; because although the law of Scotland and the law of England, so far as they proceed upon general

(1) 35 L. J. (P. & M.) 105.
(2) 3 Curteis, 16.
(3) 1842. 2 Notes of Cases (Ecc.) 36.
(4) 19 Feb. 1853. 2 Rob. Ecc. Rep. 614.
(5) 5 Coke Rep. 201.
(6) 7 P. Div. 16.

principles of jurisprudence, are sufficiently alike to make it often useful to illustrate the one from the other when those principles are involved, yet that never can be said of positive rules of law, which may be described as being more or less of an arbitrary character. But it may not be improper to say one or two words with reference to the English authorities; because I think that those authorities themselves have probably been misunderstood. It is, in my opinion, unfortunate that when an expression is used by a judge, however eminent, in explaining his view of a particular case and the principles on which it ought to be dealt with, if that expression was not previously a vox signata, or technical term of law, it should be taken up by other judges as if it had either established or recognised a technical rule which did not otherwise exist. I asked the learned counsel who was the first judge who used this word "sincerity" with regard to the subject in hand, and the answer was that it was used by a judge of the greatest possible eminence in the Ecclesiastical Courts, no less a man than Lord Stowell. Lord Stowell presided over those Courts towards the end of the last and the beginning of the present century. He became judge of the Consistory Court in 1788, and resigned that chair in August, 1821 (1). That would be a comparatively recent origin to which to ascribe a technical rule of law, and I cannot think that Lord Stowell ever intended to lay down a technical rule of law which could rightly be interpreted, as in some very modern cases, or at least in one very modern case (2), it has been interpreted, as meaning that a plaintiff bringing a suit of nullity of marriage must be actuated in his or her own mind so purely and simply by the purpose of obtaining relief from the grievance arising from the want of power said to be wanting in husband or wife as to have no secondary motive, or, in the words of the case which I have in my mind, "no mixture of subsidiary motive."

Now, with the greatest deference to any learned judge or judges who may have used such an expression, it appears to me that no such rule of positive law can be introduced in that manner by any judicial phraseology, except so far as it can be shewn to be

(1) Surtees, Lives of Stowell and Eldon.

(2) *W.* v. *R.* before Sir R. Phillimore in 1876, 1 P. D. at p. 408.

H. L. (Sc.) 1885 G. v. M. Earl of Selborne, L.C.

founded upon a just and intelligible principle. My own belief is that, to whatever criticism the phraseology of learned judges in those cases may be open, (and I must say that the adoption of that particular phrase "sincerity" seems, as the learned counsel said, to suggest a psychological question rather than one of law or fact, diving into the motives of a person's mind rather than trying whether a cause of action exists or not,) I think I can perceive that the real basis of reasoning which underlies that phraseology is this, and nothing more than this, that there may be conduct on the part of the person seeking this remedy which ought to estop that person from having it; as, for instance, any act from which the inference ought to be drawn that during the antecedent time the party has, with a knowledge of the facts and of the law, approbated the marriage which he or she afterwards seeks to get rid of, or has taken advantages and derived benefits from the matrimonial relation which it would be unfair and inequitable to permit him or her, after having received them, to treat as if no such relation had ever existed. Well now, that explanation can be referred to known principles of equitable, and, I may say, of general jurisprudence. The circumstances which may justify it are various, and in cases of this kind many sorts of conduct might exist, taking pecuniary benefits for example, living for a long time together in the same house or family with the status and character of husband and wife, after knowledge of everything which it is material to know. I do not at all mean to say that there may not be other circumstances which would produce the same effect; but it appears to me that, in order to justify any such doctrine as that which has been insisted upon at the bar, there must be a foundation of substantial justice, depending upon the acts and conduct of the party sought to be barred. Further than that I do not think it necessary for the purpose of this case to go. Of course, when facts are in dispute, motive may be all important; but that is not the case here.

Now, if that be a true explanation of the doctrine so far as it can be considered law in England (for into Scotland it never seems to have found its way at all) under the name of "sincerity," or under any name distinguishing it from "approbate" and "reprobate" and the general principles of equity, then I say

that if this case had to be tried by that doctrine, the circumstances would shew that it was inapplicable; for this lady, during the time that she and the appellant lived together, never took or had the benefit of conjugal rights. The spouses separated within two years of the marriage, and the husband has never contributed to maintain the wife. So far as appears, he has had no property at all. He could not even keep up the policy which he had contracted to keep up by the marriage contract, and she had to do it out of her proper moneys, she being the person who contributed the whole property of the pair; and from the month of June, 1879, she has resided with her own family and friends, he doing nothing whatever, and she deriving no other benefit whatsoever from the assumed marriage relation, except that she passed by his name. The only thing alleged is, that shortly before the institution of these proceedings a question was raised as to its being expedient to give up the policy for its surrender value; and she objected to that, and I think not unreasonably; because her income had already contributed a good deal more than the surrender value, and, whether she was wife or not, she had a clear right to a lien or charge upon that policy, for the purpose of reimbursing to her the moneys which, not by the marital contract but against the marital contract, she had been compelled to contribute. Therefore I think nothing of that; and the result is, that there is no single circumstance of conduct, except those which go into the merits and the evidence bearing upon the principal question of fact, which, on a reasonable view of this doctrine of "sincerity," can be alleged against her.

It is said (and it is no doubt perfectly true) that this lady has a motive for desiring to obtain the relief which she asks, different from and in addition to that which would have existed, if those circumstances had not happened which give its peculiar character to this particular case. The peculiarity is this, that the husband began by suing the wife for a divorce on the ground of adultery, and the wife had to defend herself against the husband's suit. One manifest defence, if it was open to her, was that she was not his wife, and she pleaded that defence. Undoubtedly it is quite true, that she had a motive for asserting her right to be rid of him as her reputed husband and to have the marriage declared void

H. L. (Sc.) 1885 G. v. M. Earl of Selborne, L.C.

and null, she had a motive arising out of the situation in which she had unfortunately placed herself. The success of his action against her, depending entirely upon the relation of husband and wife, would have been in several respects prejudicial to her. In the first place, there would have been the stigma of adultery. To some minds it may appear to be a mere question of degree whether a woman is guilty of adultery or of incontinence, but by the letter of the law of Scotland it appears not to be clear that it may not be something more in that country (1). At all events, a person, feeling that difference, has a motive which in itself is an intelligible and innocent motive for defending herself against that charge in any way which is open to her by law. But that is not the only motive; her fortune, or at least the whole income during her life arising from her fortune of £5000, would have been forfeited, according to the law of Scotland, by the husband's success in that suit. That again depended entirely upon her being his wife. If she was not his wife, what more reasonable than that she should be permitted to plead it in order to avoid such a forfeiture, to which in that view she was not liable? Again, she is unfortunately the mother of a child of which her nominal husband is not the father. The status of that child is a legitimate subject of care and consideration to her. If she is not the wife of the present appellant, there is a possibility, at all events if he is single, of her marrying the father of the child, and that child according to the law of Scotland would then have the status of legitimacy. That is impossible, if she is at present the appellant's wife. Can anybody say that those are motives of a fraudulent character, of a dishonest character, of a character from which there is some moral estoppel, unless there is a legal estoppel by some positive rule of law to prevent her from acting upon them, and getting the truth declared that she is not this man's wife if in truth she is not? It appears to me that there is the utmost "sincerity," in a reasonable sense of the word, in a suit brought under those circumstances. She has the most cogent motives for asking a competent Court to declare the truth—motives of an innocent, and to some extent of a laudable kind. I do not of

(1) See Statutes 1563, c. 74; 1581, c. 105; and 1701, c. 11. Notour adultery punished by death.

course mean to say that it was innocent to place herself in the unfortunate position in which she has placed herself as the mother of that child; but being in that position, it is perfectly innocent to desire that the true character of her relation to the appellant should be ascertained by law, which depends upon the question whether she is the appellant's wife or not.

Therefore, in the absence of any trace or scintilla of authority whatever from any Scotch source to the effect that this lady's suit under these circumstances is barred, or that the merits of the case are not to be inquired into, I think it would be impossible for your Lordships to reverse, on that ground, a judgment of the Court of Session which has determined that they are to be inquired into, and that they are in the respondent's favour.

With regard to the second subject, on which a question of law was raised at the bar, namely that of time, I will merely observe, that what I understand all the authorities to say upon the subject of time is, that time, like any other circumstance of conduct, is a very material element in the investigation of a case which upon the facts is doubtful. Where there is a controversy of fact, delay in bringing forward the case increases, in proportion to the length of that delay, the burden of proof which is thrown upon the plaintiff. But that there is any definite or absolute bar arising from a certain amount of delay, is a proposition which I apprehend cannot be established either by any Scotch or by any English authorities.

On this head, the main point which was argued, I really think, depended upon a misconstruction of a rule recognised undoubtedly in the English Courts, that is to say recognised in the sense which I myself place upon it, but, as far as appears, not even to that extent recognised in Scotland; namely, the rule which had a very early foundation in the Civil Law, according to which two years (1), afterwards changed by Justinian to three years, was a fixed term for the purpose of raising a certain presumption. In the Canon Law that rule, for the purpose of raising that presumption, was recognised, but subject to this, that it was to take effect when the matter to be presumed ("frigidity" is the language of the

(1) Code, lib. 5, tit. 19, de Repub. si Maritus; nov. 22, tit. 6, de Impotent; see 2 Lee, at p. 582.

H. L. (Sc.) 1885 G. v. M. Earl of Selborne, L.C.

canon) could not be proved before: "Prius probari non possit." That rule has been, under certain limitations and in a certain sense, recognised in the English Courts by various authorities. It was explained by Dr. Lushington in the cases before him to which I shall have occasion to refer, not to be an absolute rule; because on the one hand, when a three years' cohabitation had taken place, the inference to be presumably drawn from the absence of consummation within that time was capable of being rebutted; and on the other hand the rule did not exclude evidence to prove the same thing before; nor did the rule in any way exclude one kind of evidence for that purpose more than another. But the rule itself, as I understand it, has not been recognised, either in *Lewis* v. *Hayward* (1) in this House, or by any other authority, beyond this point, that when you have a husband or a wife seeking a decree of nullity propter impotentiam, if there be no more in the evidence than that they have lived for three years together, living, as I understand the word "cohabitation," in the same house and with the ordinary opportunities of intercourse, no explanation being given to rebut the presumption, if during that time the ordinary results have not followed, if in point of fact there has been no consummation, and that is clearly proved, then if that be the whole state of the evidence, inability of the one party or of the other will be presumed to have been the cause. But, as I said, that may be rebutted by evidence sufficient for the purpose. And on the other hand, upon that mere state of the facts, a presumption will not be raised from the expiry of a less period of time. But it may be (as Dr. Lushington has said, uncontradicted by any other authority, and, as it seems to me, supported by what appears on the very face of the Canon Law which has been referred to) that, though no presumption can be raised from the mere absence of the fact within a less period than three years, yet evidence may be given from which the same inference may be drawn; only it is not drawn by a presumption from a certain length of time, but it may be drawn from positive evidence. That is a reasonable state of the law, if the triennial rule, which as to the exact time fixed may be called arbitrary, is in force at all. In Scotland it

(1) 35 L. J. (P. & M.) 105.

does not appear that it has been recognised within recent times; and I think that the decisions of Dr. Lushington upon this subject, in the two cases which are reported in the second volume of Robertson's Ecclesiastical Reports, are perfectly reasonable and perfectly satisfactory.

Now upon those cases I propose to say no more than this. In the first of them, which is not the one reported in Spink's Reports, Dr. Lushington at page 618 says this:—"I am of opinion that a triennial cohabitation is not an *absolutely binding* rule. It is a convenient and fitting rule, and one not to be departed from on slight ground; still, circumstances may arise, as in the present case, to justify the Court in dispensing with it. I am not aware that there is any magic in *three* years; I conceive that the object of the rule is to provide that sufficient time may be afforded for ascertaining, beyond a doubt, the true condition of the party complained of. If the Court can be satisfied by circumstances that the complaint of the promoter of the suit is well founded, it never ought to be driven sine gravissimâ causâ, after such cohabitation as is proved in this case," (that was less than three years) "to order a return." And in the other case in the same volume (1), which follows later, and which is also reported under the initials of A. and B. in the first volume of Spinks's Reports (2), Dr. Lushington entered further into the matter, and distinctly held, upon evidence in my judgment not stronger than that in the present case, not only that there was no obstacle to granting, but that he was obliged to grant, a decree in favour of the promoter of the suit.

That is all that I think it necessary to say upon the subject of the points of law which have been argued; because the last argument which Mr. Wallace, with ingenuity as well as zeal, advanced, but which your Lordships I think did not hear from his learned leader, namely, the argument that the lapse of the respondent had produced an alteration of status which rendered her no longer able to bring this action, seemed to turn upon the most transparent fallacy possible. He seemed to me to think that a woman who was not in a situation to ask for the restitution of conjugal rights was not in a situation to say that she was not a

(1) 2 Rob. Ecc. Rep. at p. 636. (2) At p. 12.

H. L. (Sc.) 1885 G. v. M. Earl of Selborne, L.C.

wife. Why? To say that she is not a wife, and to ask for restitution of conjugal rights, are absolutely inconsistent and incompatible things—she cannot do both; and therefore it is quite clear, that, in order to obtain a declaration that she is not the wife, she is not only not obliged to ask, but she is not in a position to ask, for a restitution of conjugal rights.

Now, upon the facts of the case I should like to be as brief as I possibly can, because this class of facts is one which it is neither agreeable to one's self nor edifying or useful to others to dwell upon, and in truth there is only one reason why I go into the particulars at all. My reason is this, that there is undoubtedly upon this evidence a point, at which a question arises whether the lady is chargeable or not with putting difficulties, not justifiable on her part, in the appellant's way, and whether that should or should not alter the conclusion to be otherwise drawn from the evidence. That question does appear to me to arise upon the evidence; and therefore it is necessary for me to present (I will endeavour to do it very briefly and with as much reticence and reserve as I possibly can) my view of the evidence, which will shew the grounds upon which I am unable to dissent from the conclusion of fact which was arrived at in the Court below. It is clear (I will not read the passages in the evidence, some of them will be found in the appellant's printed case at pages 37 and 44) that in this case at the time of the marriage there were mutual attachment, attraction, and regard. The gentleman says that he was very much in love with the lady, and it was perfectly clear that it was a marriage of inclination on her part. That seems to me to be an exceedingly important circumstance, in connection with what follows; because even allowing that the man was bashful, even allowing whatever weight is due to his inexperience with women, yet still I cannot but think that, as long as their mutual attraction and regard and attachment lasted at all events, which upon the evidence I conclude to have been at least till the end of the year in which they were married, more than a month at least, if there were no natural infirmity, the natural consequences would presumably have resulted, but they did not. The evidence of the gentleman and of the lady (I do not wish to impute to either of them any wilful misstatement of facts) is not quite consistent as

to the degree of frequency with which the husband endeavoured to prove his power. She says at page 20 (and when I say that I do not wish to impute wilful misstatement to either of them, I must also say that I see no reason whatever to prefer his recollection to hers in such a matter), being asked, "Did your husband's attempts extend over the whole period from the date of your marriage on the 29th of November, 1877, to the three days before the 14th of February, 1878?" "Yes." Then she is asked, "Can you say how many times these attempts were made?" She answers, "I cannot say." "*Q.* Were they tolerably frequent? *A.* At intervals of two or three days, and sometimes less." Of course she is not to be held to a literal computation in those words, but the result is that if there had been nothing else for your Lordships to draw your conclusions from, one would suppose that the attempts were frequently repeated, and occurred twenty times or more during that period; and I must say that I think the probability is rather that it would be so, because if the husband had any hopes he would not give them up quickly; and if I accepted his statement that, when their affections were still unchanged, during the honeymoon, he only made those endeavours twice, it would be so extraordinary, that from that fact alone I should be disposed myself to draw the inference that there was some conscious inability.

Nobody can be surprised, I think, if on the part of the wife some coldness and alienation supervened after those repeated ineffectual attempts, which undoubtedly was the case.

We are brought down to January and February, for according to the lady the latest attempt was about the 11th of February; according to him it was at the end of January. And then we come to the evidence, which to my mind is exceedingly important, of Dr. Sidney Smith, who says that he saw this gentleman and conversed with him as a medical adviser upon this subject not less than seven times, the first being on the 29th of January and the last being on the 27th of March. The dates (and they are worthy of particular observation) are the 29th of January, the 31st of January, the 18th and 23rd of February, and the 25th, 26th, and 27th of March, 1878. Now on the first of those occasions, the doctor, not volunteering it, but in answer to a request,

H. L. (Sc.) 1885 G. v. M. Earl of Selborne, L.C.

prescribed for him certain medicines. He reports a conversation which took place as one in which the appellant had so spoken as to leave upon his, the doctor's, mind an impression that the case was one which might not be hopeless. "He asked me if anything could be done for him—could he take anything. I said yes, and prescribed for him on that day the following mixture." He then gives the prescription. Then at each of the later interviews the subject was renewed between them, and Dr. Smith reports the conversation thus: "I asked him on one of these occasions whether there was any reciprocity on the part of his wife, or whether he got the 'cold shoulder.' He said certainly she would not allow him to come near her; and on one occasion I asked him how we were to know whether the medicine was doing him any good if there were no means of proving it. I said, there was probably some disappointment on the part of his wife, and if he exercised a little tact the coolness might pass off, and they might come together again." Now to me it is manifest that, if Dr. Sidney Smith's recollection is to be trusted, (and I do trust it,) the appellant, though he asked for medicine, never told Dr. Smith that he had not taken or used it, but left Dr. Smith under the impression that he had done so, and that it was discouragement on the part of the wife which, and which alone, prevented it from being tested. No better advice could possibly have been given to a man in that position, if there was a chance of things coming right, than the advice which Dr. Sidney Smith gave. I dare say that his prescription was a very good prescription, but his moral advice was unquestionably good. As far as I can see, the appellant never really tried it.

Now the appellant tells us that he never took those prescriptions. He excuses himself by saying, "He gave me some prescriptions, which I did not take, because at that time my wife's conduct had done away with all affection for her for the time," and in a later page, page 46, he seems to fix the date at which the wife's repugnance had produced repugnance on his part; he says that he gave up the idea of consummating the marriage finally at Kurrachee. To that subject I shall have occasion to advert afterwards. Now at Kurrachee they were from, I suppose, the 17th of February, or thereabouts, for some little time after-

wards; and it is a very remarkable thing, if the appellant was not conscious of more than he admitted to Dr. Sidney Smith, that he should in those conversations with him not have said, "It is of no use talking about this any longer; her behaviour to me is such that I no longer have any desire to exercise those rights. I am not disposed to use any means which you recommend to me for that purpose. I give up the thing entirely."

The only occasion on which we have any evidence whatever of the wife actually behaving to the husband in such a way as to impose an impediment, beyond that which might arise from the absence of encouragement and from the feeling evidently engendered by previous failures, is on that first night when they were at Kurrachee; and it is remarkable that the husband insisted after that night upon continuing to occupy the same bed with her, and did so in substance until their separation on the 29th of June, 1879, and during all that period there is not the slightest trace whatever of there being any disposition on his part to assert a husband's rights, or to prove his power, or of his putting her to the test whether she would permit him or not. There is no trace of his doing that which Dr. Sidney Smith had advised him to do, namely, exercising a little tact. If the subject was painful, or if her temper made it difficult for him fully to explain himself to her by word of mouth, he might even have written to her to say that the difficulty had passed away and that he had no doubt now of his sufficiency, that he was sure that there was no other cause for alienation between them than that, and that he was now in a position to prove his ability, that the happiness, respectability, and credit of both their lives might depend upon his having an opportunity of proving it, and that he must throw upon her, and upon her alone, the responsibility if she refused to give him such an opportunity. He does nothing of the kind, but he abides by the resolution which he says he formed at Kurrachee.

Now, he adds this. At page 46, immediately after saying that he finally gave up this idea at Kurrachee, though he did not directly tell Dr. Sidney Smith so, a question is put as to his having tried to have connection with her several times and failed, and he says "Yes." Then he is asked, "Do you think she had reasonable

H. L. (Sc.) 1885 G. v. M. Earl of Selborne, L.C.

ground for believing that you had failed finally? *A.* I suppose you may call it a reasonable belief." That is to say, that the facts known to himself were such, that he could not deny that she had reasonable ground for that belief. Now I do say that, under those circumstances, if he desired to retain a husband's place, if he was capable of doing a husband's duty, he had every conceivable motive for at least bringing the matter to the point at which the burden of refusing would have been thrown upon her, and he had abundant opportunities of doing so. It is clear that he never did so. The separation, which took place ultimately in June, 1879, was, to say the least of it, voluntary on his part. He never shewed afterwards any serious desire to have a husband's place.

I think, in that state of things, when you turn to the medical evidence, you find the strong preponderance of the medical evidence to be this, that in that state of circumstances the reasonable conclusion is that at least as to this lady (and, as Dr. Lushington said in the case reported in the 1st volume of Spinks (1), the conclusions of the Court can never go further than the case presented to it) the appellant was incapable of performing a husband's duty. No doubt, some of the medical men suggest that it is possible that under other circumstances, and with a great deal of help and assistance and encouragement, and so on, on the woman's part, it is consistent with what they have observed, that he might be found capable; but that is a mere speculation as to circumstances which have not existed, and opposed to the reasonable and practical conclusion from those which did exist. I am not myself, I confess, in the least capable of forming an opinion of my own as to any inference which ought to be drawn from the antecedent circumstance of this man having lived an absolutely continent life till he was fifty years old, which was his age at the time of the marriage; but it appears to be the opinion of all these medical men, that the habit of body which might result from that fact, taken in connection with the evidence which we have of what actually took place after he had been married, strengthens the inference to be drawn from the direct evidence of his want of success in performing a husband's part, that he was incapable of doing so. As I have said, I should not have been able myself to

(1) At p. 12; see also 2 Rob. Ecc. Rep. at p. 633.

have drawn any conclusion of that sort; but with the medical evidence before me, I am obliged to say that there is evidence that that is a state of things material to be considered, in connection with the evidence of what afterwards happened. I am bound to add that I entirely lay aside (and I do not think the medical witnesses placed any stress upon it) the short period of vicious practice which had taken place in the childhood of this gentleman. My own impression is that it is a pity it was introduced at all, although it was creditable to the appellant to have acknowledged it to the medical witnesses. I think it has no real value as bearing upon the conclusion to be drawn from the rest of the evidence.

The whole result, I think, is this: if a jury had had to determine the question upon this evidence, and had found as the Court below have found, would it have been possible to say that that was a verdict which they were not justified in coming to? I think not; and being of that opinion I cannot give my voice for reversing the decision to the same effect of the Court of Session. I therefore move your Lordships to affirm the interlocutors appealed from, and to dismiss the appeal, with costs.

Lord Watson:—

I am of opinion that the majority of the Second Division of the Court of Session were right in holding that they were not precluded from considering the effect of the evidence upon the merits of the case, and also that they were right in holding that upon the evidence the respondent was entitled to decree.

The first plea against any consideration of the merits of this case was rested upon the rule as to "sincerity," or more correctly speaking, insincerity. I agree with the observations which have been made upon the English cases bearing upon that matter by my noble and learned friend the Lord Chancellor. It humbly appears to me that the expression is not a very happy one, and also that it has been used occasionally in circumstances which render it still more inappropriate. I think that when those cases are dissected they do shew the existence of this rule in the law of England, that in a suit for nullity of marriage there may be facts and circumstances proved which so plainly imply, on the

H. L. (Sc.) 1885 G. v. M. Lord Watson.

part of the complaining spouse, a recognition of the existence and validity of the marriage, as to render it most inequitable and contrary to public policy that he or she should be permitted to go on to challenge it with effect. If that be, as I am inclined to think it is, the rule of the law of England, I have no hesitation in saying that it is a rule which prevails in Scotland also. But if the English rule goes further, if the rule goes to the extent to which it has been pleaded on the part of the appellant in this case, I have just as little hesitation in saying that it has no place and is of no authority in the law of Scotland. What has been contended for at the bar comes to this, that wherever, before the spouse complaining of the impotency of the other has raised an action for the purpose of having the nullity of the marriage declared, there arise circumstances which render it a matter of legitimate interest that the nullity should be declared, if these circumstances are what are called collateral to the marriage, all suit is barred. It is said that the addition of a strong and legitimate motive to that already existing, instead of strengthening, as I should have thought, the title of the pursuer in such a case, is to have the effect of cutting it down altogether.

Then the second ground upon which it was maintained that it was incompetent to deal with the evidence in this case is the triennial rule as established in the Canon Law. No doubt there is not much authority to shew how far that rule has been followed in practice in the law of Scotland; but seeing that it is to be found in the Canon Law and is in itself not an unreasonable rule, and has been so recognised in the jurisprudence of England, I have no reason to suppose that the Courts of Scotland would hesitate to adopt it where it is applicable. But what is that rule as declared and established by the Canon Law? It simply raises a legal presumption that where two persons after solemnizing a marriage live together and cohabit for a period of three years, and the lady is able to shew that she is virgo intacta, that state of things in the absence of rebutting proof on the part of the husband will entitle her to have the nullity of the marriage declared. But it is one thing to have a rule establishing a presumption, and quite another thing to have a rule of positive law excluding all other evidence than that which is derivable from

such a presumption. The contention at your Lordships' bar has practically been, that in certain circumstances, where the impotence complained of is of a peculiar character, you cannot regard evidence establishing it, and that no party can have a remedy against it unless he or she comes to the Court fortified by that presumption, even although the evidence should be in itself amply sufficient to convince every reasonable mind that the complaint is well founded. I have heard no authority for that. I do not think that any one of the English cases comes up to it; and if they did, I for one, should not be prepared to adopt it as part of the law of Scotland.

I now come to the evidence in this case; and as I do not precisely adopt all the observations which were made upon the evidence in the court below, I shall deal with it, but I will do so shortly and in general terms, because the subject is a remarkably uninviting one. Upon the evidence I am not prepared to say that the appellant is absolutely incapable of having sexual intercourse. At the same time I think it may be confidently affirmed that he is not, in the ordinary sense of the term, vir potens. The conclusion which I draw from the whole circumstances of the case is that owing to the feeble virility and the nervousness of the appellant, and the feelings of indifference or dislike with which the respondent had come to regard him, the marriage never would have been consummated although they had continued to cohabit, and that consummation being thus a practical impossibility, the respondent is entitled to the remedy which the Court below have given her. If non-consummation had been due to conduct on the part of the respondent which could have been characterized as improper, or as in breach of conjugal duty, that might have led me to a different conclusion; but I can find no ground for imputing such conduct to the respondent. According to the evidence the respondent did not resist the appellant's advances. She neither encouraged nor repelled them, and the appellant cannot with justice complain of that state of indifference which was the natural consequence of his own weakness and repeated failures.

I therefore concur in the judgment which your Lordship has proposed.

H. L. (Sc.) 1885 G. v. M.

LORD BRAMWELL:—

I propose first to consider the question whether the impotency of the appellant is made out. On that subject I have really very little to add to what has been said already. I am not sure that that which took place in his youth may not have had something to do with this matter, but I will only say about it that it is remarkable that he should have discontinued that practice giving no reason why he did so. It may possibly have been from an inability to continue it. I need not, however, allude to that subject more particularly. After that period there were thirty years of abstinence from sexual intercourse. There were then the various attempts which were unsuccessful, and there was no further attempt. It is incredible to my mind that there would have been none if he had had those conditions of body which would have enabled him to perform his duty to this unfortunate young lady. Then there is his confession to one of the witnesses. We must consider all these things; and although he says in his evidence that he does not believe he is impotent, at the time of giving it, he does not say that his condition has ever been such as to afford any symptoms or indications that at any time of his life if he had been so minded and if he had had an opportunity of sexual intercourse he could have availed himself of it.

Then there is the medical evidence, which seems to me to be, I may say, discreet on both sides; that is to say, the man having the material indications or appearances of virility the doctors do not undertake to swear, on the part of the respondent, that he never could at any future time perform a husband's duty to a wife; but they say that they do not believe, as a matter of belief, as a matter of conclusion from the evidence, that he could. And really, my Lords, with all respect to experts, attaching value to their evidence in so far as they say that their experience of other cases has enabled them to form an opinion, which of course is an advantage which one has not had one's self, yet as to other matters as to which they speak I take the liberty of saying that I consider myself free to form my own judgment, and my speculations as to the conduct of human beings under those circumstances are those which must govern my mind, and not those which they think fit

to put before us as to which they have no greater knowledge than ordinary persons.

To my mind upon this evidence it is conclusively proved that this man was incompetent, not merely in the sense in which my noble and learned friend opposite (Lord Watson) has put it (which I think, however, is irresistible), but I should come to the conclusion that without doubt he was incompetent not only with respect to this particular woman but with respect to all women. And I avail myself of what was put by the noble and learned Earl on the woolsack. It is not possible to say that if a jury had found as a fact that the man was incompetent, that would have been a wrong verdict. Yet we are called on to say that the finding of fact appealed from was wrong. I will put it in another way. If he is liberated by the decree which has been pronounced against him, and if he marries another woman without informing her of what has happened with reference to this one, will any one doubt he would be guilty of a most wicked and abominable act? I cannot doubt that the respondent has made out her case.

Well then, I will just say one word as to the point which was made about her disqualifying herself by her incontinence with some other man. Suppose that she had bonâ fide believed that the appellant was dead and had married another man and had had a child, that would be no answer in England (I do not know how it would be in Scotland) to an indictment for bigamy; the punishment would be small, but it would be no answer to the indictment, and the child would be a bastard. But there would be no moral guilt. Could it be pretended that in that case she would have disqualified herself? Then what is the difference? The only difference is that in this case there is the guilt of incontinence,—there is a moral guilt, which would not have existed in the supposed case.

Now, one word as to this question of "sincerity." It is a most remarkable expression, a very curious word, and I am not at all sure that it has not resulted from this, that sincerity is a very important matter in ascertaining whether the spouse complained of is impotent or not, and sincerity has been dwelt upon for that purpose till at last it has been taken to be a separate head of objection to the complaining party's proceedings. It seems to

H. L. (Sc.) 1885 G. v. M. Lord Bramwell.

me very strange. What the complainant does in a suit of this sort is to come to the appropriate Court for a declaration of the truth: "I say that this man is impotent and was so at the time of the marriage, and I ask you to declare that fact." The very words of the summons are, "Declare the truth, that this man was impotent when he married me." The Court say, "No we will not," or the argument is that the Court ought to say, "No we will not—we know that it is true, but we will not say so"—why? In my opinion a man who has inflicted this cruel wrong upon a woman ought not to be heard to object to her complaining, when she comes forward with her complaint of this wrong that he has done her, unless in some way or another he can shew that he sustains some injury from the double matter of her not having complained earlier, and of her complaining now. In such a case I should indeed think that a law might be made (perhaps it exists, for aught I know,) that in some way or another the declaration of the truth should be accompanied by some compensation to him for the sort of injury which, as I have indicated, might have been done to him.

But supposing that there is such a rule or head of objection of want of sincerity (I do not know how to phrase it), in my opinion this case is not open to it. This poor creature comes here, driven by the conduct of the appellant, for a reason which is, I think, perfectly intelligible. I do not think that men are altogether good judges in matters of this description. I can mention a very remarkable case which came before me in Monmouthshire of a man who was indicted upon nineteen separate indictments for rape. In order to make sure that the man was guilty, I was not satisfied with a verdict upon the first case, but I tried three or four, and there was no doubt about it. The man himself practically stood in the dock and acknowledged it. The story is so incredible that I may mention some of the particulars. It was upon the top of a lofty hill between two valleys in Monmouthshire, over which there was a footpath, and he used to lie in wait on the top of this hill, and when he saw a woman coming he assaulted her with any amount of violence which was necessary to enable him to accomplish his purpose. The reason why I tell the story is this. I was informed on the most trustworthy authority, (and I believe it,) that there

were as many cases against him as those upon which true bills had been found, where he had similarly assaulted women, but where they, rather than submit to the indignity of having to come and tell of the outrage and disgrace which had been inflicted upon them, refused to appear against him. And I can very well understand that in a case of this description a woman would be most reluctant to come forward and stand the shocking ordeal of giving evidence. Read that which the respondent had to give in this case, and see how distressing it must have been to her. She puts up then with the wrong which has been done to her by the appellant until she is driven to bring this suit by his calling her an adulteress, and seeking a divorce from her, which divorce would be followed by a forfeiture of her property if he chose to insist upon it. I put it to Mr. Davey, suppose that after a man and woman had lived together under these circumstances, he being clearly impotent, his regard for her, if he had any (and I suppose he must have had, otherwise I cannot see why he should have married her), had failed and he taken to ill-using her, beating her, would it then have been open to the objection of insincerity if the woman had brought a suit for a declaration of nullity? Mr. Davey, arguing, said (and I do not see how he could argue otherwise,) that it would. So that supposing a woman was ill-used by having this gross injustice done to her, but rather than complain of it, and tell her disgusting wrong, put up with it until her life was made intolerable by the misconduct of her husband, she could get no redress of it. I think it is impossible that that can be the law, and in my mind that goes a long way towards shewing that it is not the law.

I will just add one more word about this matter. I really cannot understand how this appellant can have done otherwise than welcome the suit which the respondent brought for the purpose of making her offence against chastity less grievous than it would have been if she had been his lawful and true wife. I cannot understand how he could have done otherwise than meet her eagerly to have that decree pronounced which she was praying for, and atone to some extent for the wrong he had done her. It seems to me to have been a most cruel thing for him to have acted as he did.

H. L. (Sc.) 1885 G. v. M. Lord Bramwell.

It is now twenty-five years, or nearly so, since I delivered my judgment in *Castleden* v. *Castleden* (1). I think that I may claim credit for the possession of sufficient candour and sufficient—what shall I say? self-denial, to be able to say, that if I thought that that judgment was wrong now, after twenty-five years, I could say, "Well, I was wrong then, but I know better now." But I have read it, and I will say that there is not one word which I uttered then—either in law, or in reasoning upon the facts, or in feeling—which I would not repeat at the present moment, and it does seem to me that the judgment which was given in the Probate Court and in this House, (I say it with all submission,) is a mixture of two things, either of which taken separately comes to nothing.

Lord FitzGerald:—

The procreation of children being the main object of marriage, the contract contains by implication, as an essential term, the capacity for consummation. There may be special circumstances in relation to the marriage of a character to deprive the parties, or one of them, of the right to be relieved on the ground of impotence. But there is no such special circumstance in the present case. The pursuer rests her case on the ordinary rule that she is entitled to be relieved, if she can establish by reasonable and reliable evidence that the defender was at the time of the marriage impotent, and has remained so. The defender denies permanent impotence, and that is the real question now to be determined, and upon that question, from the beginning, I have entertained a very decided opinion. He further relies upon the supposed rule as to the necessity of triennial cohabitation, as to the want of promptness in instituting the suit, and as to insincerity and the presence of a subsidiary motive.

I rest content entirely with the judgment of the noble and learned Earl upon the woolsack as to these additional defences which the defender seeks to raise; but I would add further, that even if the rule as to triennial cohabitation contended for by Mr. Wallace existed in the law of Scotland, it would be totally inapplicable to the circumstances of the present case, and the special circumstances here would take it out of this rule if it

(1) April 11, 1861. 9 H. L. C. 186; 29 L. J. (Prob. & M.) 81.

existed. I can very well understand all these additional allegations coming in aid, and I take them in aid upon the question of evidence. For instance, it is alleged that there was insincerity in this sense—that this lady had another motive besides a strong desire to be relieved from the tie of this marriage. She has the strongest of all motives, a motive so strong that I should be inclined to regard her evidence, if in its main features it was controverted, not alone with caution but with suspicion. It is not only her eager desire to be relieved from this marriage tie, but further she has to relieve herself from the charge of adultery; she has to protect her fortune, and to attain a position which may enable her to relieve her child from the status of bastardy.

When all these circumstances are taken into account they would lead me to consider what has been so much contested in this case, not as indicating rules applicable to the special case before us, but as laying before us reasons why we should regard with caution the evidence given on behalf of the pursuer. Then the question, as I have thought from the beginning, and the only question in the case, is this, Is the evidence sufficient to establish a case of permanent impotency against the defender? There are certain states of fact not controverted but admitted on both sides, and I take it that the Lord Ordinary was correct in saying that the real facts of the case—the real matters in proof—were not controverted, but there might be a great controversy as to what were the legitimate inferences to be deduced from the facts so proved. The question which we have to consider is, what is the reasonable inference to be deduced from the facts absolutely established. What are we to deduce, having regard to the ordinary experience of life, and applying common sense to the facts which are before us?

Before dealing with these facts, I will, in a very few words, advert to one other matter which Mr. Wallace brought before us. He relied upon the unwillingness of the pursuer to continue cohabitation. No doubt she did exhibit, after a certain period, the strongest unwillingness; and I would ask, How could it be expected to be otherwise? For two months this woman had submitted to what I should call treatment degrading in the highest degree, especially in reference to the later statements which the

H. L. (Sc.) 1885 G. v. M. Lord FitzGerald.

defender has brought forward as indicating that he thought there was a recommencement of his virile power; and she certainly would not have had the feelings of a woman if she had been willing that that disgusting treatment should continue.

Again, it is said that she made no complaint. But is that statement well founded? Why, from the time of the abandonment of his marital rights by the defender, which he tells us took place in February, her life has been a protest. Not only can it be said that there has been complaint, but through the whole of her married life there has been a protest against the condition into which she had fallen.

Now, let us consider what is the general character of the evidence, and ask ourselves as reasonable men and applying our experience of the ordinary circumstances of life to the case, ought there to be a doubt upon this subject of permanent impotence? I do not allude to anything in the defender's early life. He certainly was a man of chastity for the thirty-five years that he lived before his marriage and after he left school. His statement is (and I have no doubt of its truth) that he never had intercourse with a woman. That may spring from virtue—it may spring from high principles of chastity—but there is another view to be taken of it, and a doubt may arise whether that continued abstinence from women did not indicate at the earliest period the absence of a want of virile power, and the continuance of that defect.

I called attention to that part of the case early in the argument as one of the important elements or one of the important lights to guide us in regard to the evidence. This gentleman up to the time of his marriage not only had no sexual knowledge of women, but, according to his statement to a friend just before his marriage, he did not even understand what his marital duties would be. He asked this friend, was it not expected of a married man that he should do something or another; and he evidently went to his friend, to get information upon the subject. Well, then, when a man of fifty or in the fiftieth year of his life under these special circumstances marries a young woman of twenty, described as handsome, desirable, and one who is likely to create passionate sensation, and lives with her for a period of at least

two months, but probably two months and eleven or twelve days, and makes not only one effort but repeated efforts to accomplish the duty of a husband, and in every instance with complete failure, from that the fair inference is the non-existence of marital capacity. But he says, "If I have time, and if I have opportunity, and if I have encouragement and assistance, I believe that all will come right in the end." But is that the kind of capacity which a wife seeks for in a husband? One of the doctors speaks of "due encouragement." Nay more, the wife is to submit to the degradation of "assisting;" and he adds, "If you supplement that by a bottle of champagne he may possibly effect his purpose." And we are asked upon this evidence, upon a statement of that kind, and upon the opinion of a doctor based in part upon what he heard from the defender, to rebut the fair inference arising from the facts incontestibly proved that at the time of the marriage this man was incapable, and that during two months, at least, notwithstanding repeated efforts, he proved his incapacity; but we are to go still further and complete the term of three years' cohabitation, allowing effort upon effort to be made, in the hopes that in the end something may come of it.

Now, upon the medical evidence it is very curious that the defender himself tells us that in the month of February he gave up once and for all any further attempt. He says that he was induced to that because of the evident dislike which the pursuer shewed to his embraces. One is not surprised at it; but is it accurate? is it true? Because more than six weeks after he has given up, as he alleges, once and for all any attempt to have connection with his wife for sexual purposes, we find him consulting Dr. Sidney Smith. He consults him as late as the 27th of March. And what is the question which he puts in his conversation with Dr. Sidney Smith? In these communications, up to the 27th of March, his conversation is as to his not being able to consummate the marriage. So that up to the 27th of March, six weeks after he says he desisted from attempts, he was in consultation with Dr. Sidney Smith, and he was advising with him as to the means by which he might acquire the strength which would enable him to consummate the marriage. Dr. Sidney Smith gave him recipes

H. L. (Sc.) 1885 G. v. M. Lord FitzGerald.

or supplied him with medicines. I do not know which. He says that he never took those medicines, but that is to me persuasive proof that he felt, when he desisted from having communication with his wife, that he was incapable, and that he hoped to restore his capacity by exciting medicines, but that he failed to continue taking them because he found them to be useless.

With regard to the remaining medical evidence, some of it I do not value much; but there is one sentence in the evidence of Dr. Angus Macdonald, which is extremely suggestive. He says, "I think it is hardly in human nature to imagine that he was capable of performing the marital act when he did not do so while they lived together. In some cases there is a temporary incapacity." He then alludes to transactions of newly married people, and proceeds to say, "In the present case the opportunities recorded in the evidence were far too numerous to account for it without a distinct defect of virile power." Then he enters into details, such as the defender communicated to him, or he has heard in his evidence. He adds, "And these," that is the conditions which the defender has himself described, "are just the conditions in which we find the worst cases of impotency in the male." According to that medical evidence he had in his statements indicated the worst features of permanent incapacity; and yet we are asked to act upon his own belief founded only upon the possibility that if time and opportunity were given to him, and if the adjuncts which I have already described were supplied to him, he might in the end find means of consummating his marriage.

The inference which I draw is the very opposite. From the defender's history, from his two months of abortive attempts, from his one year and six months of lying beside this desirable young woman without even making an attempt to exercise his rights, I come to the conclusion, clear and plain to my mind, not alone that he was incapable as to her, but that he was impotent at the time of the marriage, and that that impotency was permanent.

It is said that the pursuer ought sooner to have instituted the suit. I ventured to observe in the course of the case, and I repeat it now, that there is not one of us who cannot recall to memory

the experience of some case in which a woman submitted to the worst of treatment, treatment degrading and humiliating, and allowed it to continue rather than permit her name to become the subject of a public scandal. And when we add to this that the lady in question had two sisters, young and unmarried, who would necessarily be implicated in any disclosure as to her character, that would greatly strengthen her motives for silence, and probably she would have submitted to much more if she had not been driven to her present course by the institution of the action for divorce.

Upon these grounds, my Lords, I entirely concur in your Lordships' judgment.

Interlocutors appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 5th March, 1885.

Agent for appellant: *Andrew Beveridge, for Beveridge, Sutherland, & Smith, S.S.C., Leith.*

Agents for respondent: *Stibbard, Gibson, & Co., for Boyd, Jameson, & Kelly, W.S., Leith.*

[HOUSE OF LORDS.]

H. L. (E.) 1885 March 26.

THE METROPOLITAN BANK, LIMITED, AND ARTHUR COOPER THE LIQUIDATOR THEREOF . . . . . } APPELLANT;

AND

ALEXANDER GOPSELL POOLEY . . . RESPONDENT.

Practice—Dismissing Action as frivolous and vexatious—Abuse of Process of Court—Order XXV., r. 4—Action for maliciously procuring Bankruptcy—Maintenance—Bankruptcy Act 1869*—Cause of Action passing to Trustee in Bankruptcy—Company in Liquidation—Corporation.*

A bankrupt whose adjudication in bankruptcy has not been set aside cannot maintain an action for maliciously procuring the bankruptcy; and such an action may be summarily dismissed upon summons as frivolous and vexatious.

Whitworth v. *Hall* (2 B. & Ad. 695) approved.

A bankrupt cannot maintain an action for maintenance on the ground that the defendant incited and supported bankruptcy proceedings in which he had no common interest, since the cause of action (if any) passed to the trustee in bankruptcy; and such an action may be summarily dismissed upon summons as frivolous and vexatious:—

Held also, by the Earl of Selborne L.C., that a corporation in liquidation, as distinct from the individual liquidator, is incapable of committing such an act of maintenance.

The inherent jurisdiction of the Court to protect itself from abuse is recognised and extended by Order XXV., rule 4, of the Judicature Rules of 1883.

APPEAL from an order of the Court of Appeal.

The writ of summons in the present action was issued on the 7th of December 1883 against the Metropolitan Bank and Sidney Toppin, and was indorsed "the plaintiff's claim is for damages for fraud and conspiracy and for maintenance."

The statement of claim contained the following allegations:—

1. The plaintiff has suffered damage by the wrongful acts of the defendants in fraudulently and without reasonable cause procuring the plaintiff to be adjudicated bankrupt.

2. The adjudication took place upon a petition presented by the defendant Toppin, and after the commencement of the bankruptcy proceedings and before such adjudication the defendants

the Metropolitan Bank gave to the defendant Sidney Toppin an indemnity against all costs and expenses which he might incur in consequence of such bankruptcy proceedings, and at the time of such adjudication the defendants and in particular the defendants the Metropolitan Bank had no common interest in the bankruptcy proceedings or in the debt upon which such proceedings were founded.

3. The plaintiff before the adjudication tendered to the defendant Toppin the whole of the debt claimed by him against the plaintiff in the bankruptcy proceedings together with a sufficient sum to cover the costs of such proceedings, but the defendants the Metropolitan Bank declined and intervened and would not allow the acceptance thereof, and the plaintiff was adjudicated bankrupt upon the petition of Toppin.

4. The matters hereinbefore complained of were done in order to enable the defendants the Metropolitan Bank to possess themselves of the plaintiff's property or the greater part thereof, which they have wrongfully and fraudulently done.

5. The plaintiff by reason of the before-mentioned acts of the defendants claims damages for the maintenance of such bankruptcy proceedings and otherwise as aforesaid.

The plaintiff claims £30,000.

In March 1884 the Metropolitan Bank took out a summons to dismiss the action as frivolous, vexatious and harassing, or to stay the proceedings until the costs in the action of *Pooley* v. *Royal Exchange Bank and Others* were paid.

The following facts appeared from the affidavits. In March 1879 the Metropolitan Bank was directed to be wound up under the Companies Act 1862, and the appellant Arthur Cooper was appointed official liquidator. In October 1879 the respondent Pooley was adjudicated a bankrupt upon a debtor's summons issued by Toppin: he appealed against the adjudication but the appeal was dismissed in November 1879, no one appearing for the bankrupt. An application to annul the bankruptcy was made on the 16th of July 1880 and refused, and this decision was not appealed from. On the 28th of July 1880 Pooley brought an action against the Royal Exchange Bank, the now appellant Arthur Cooper, and others, for damages for (inter alia)

H. L. (E.) 1885 METROPOLITAN BANK v. POOLEY.

maliciously causing the filing of a bankruptcy petition against the plaintiff and maintaining the same by fraud and concealment, and for the wilful, corrupt and malicious prosecution of the plaintiff without reasonable or probable cause. At the trial of this latter action in May 1881 judgment of nonsuit with costs was entered for the defendants. No part of the costs had been paid by Pooley. In August 1881 the appellant Arthur Cooper and others were summoned to the Bow Street Police Court for wrongfully and unlawfully stirring up, inciting and inducing Toppin and divers other persons respectively to file a petition and prefer claims against Pooley in the London Bankruptcy Court; and for unlawfully and wrongfully maintaining the said persons in their several proceedings by money, aid and counsel, to the oppression and injury of Pooley against the peace and contrary to the statutes &c.; and for conspiring, confederating and agreeing together and with one another by the unlawful and wrongful means aforesaid and by divers other means and devices to oppress and injure Pooley against the peace &c. The summons came on to be heard on the 14th of September 1881, and was dismissed with costs to each defendant.

The summons in the present action was referred by the Master to the Judge in Chambers, and was dismissed by Mathew J. The Divisional Court (Stephen and Williams JJ.) made an order staying the proceedings till the costs in the action of *Pooley* v. *Royal Exchange Bank and Others* were paid, on the ground that the two actions were substantially between the same parties and for the same causes. The Court of Appeal, taking a different view of the facts and holding that the parties were not substantially the same, rescinded that order and dismissed the summons. From this decision the present appeal was brought.

March 24. *R. E. Webster* Q.C. and *A. T. Lawrence* for the appellants argued at length upon the facts that the Divisional Court had taken the right view, and that both actions were substantially for the same causes and between the same parties, the Royal Exchange Bank being the transferees and successors of the Metropolitan Bank. Their arguments and the facts on which they relied are omitted as irrelevant to this report, the decision

of the House being based upon different grounds, suggested during the argument by the Lord Chancellor.

[EARL OF SELBORNE L.C.:—Ought not the action to be dismissed on the short ground that the adjudication in bankruptcy has not been set aside?]

There is jurisdiction to take that course: *Dawkins* v. *Prince Edward of Saxe Weimar* (1); *Castro* v. *Murray* (2). Under the old bankruptcy law an action for maliciously suing out a commission of bankruptcy would not lie unless it was averred and proved that the commission was superseded before the action was brought: *Whitworth* v. *Hall* (3). The only recent case is *Johnson* v. *Emerson* (4) where Martin B. doubted whether since the Bankruptcy Act of 1869 an action would lie for maliciously procuring an adjudication in bankruptcy.

Gazdar (*W. Shalleross Goddard* with him) for the respondent was asked if he could distinguish this case from *Whitworth* v. *Hall* (3).

The writ of the present action was indorsed with a claim for damages for fraud and conspiracy and for maintenance, and the principal ground alleged in the statement of claim is for maintenance, based on the decision in *Bradlaugh* v. *Newdegate* (5). This cause of action is quite distinct from the maliciously procuring the bankruptcy.

[EARL OF SELBORNE L.C.:—If so, would not the cause of action vest in the trustee?]

Possibly, but that is no ground for summarily staying or dismissing the action, and has never been so held. In *Cobbett* v. *Warner* (6) the plaintiff was an undischarged bankrupt, but although the cause of action vested in the trustee the action was not dismissed, and the only ground on which it was stayed was the nonpayment of costs. The maintenance was not part of the cause of action in the first action.

Webster Q.C. for the appellants was not heard in reply.

(1) 1 Q. B. D. 499.
(2) Law Rep. 10 Ex. 213.
(3) 2 B. & Ad. 695.
(4) Law Rep. 6 Ex. 329.
(5) 11 Q. B. D. 1.
(6) Law Rep. 2 Q. B. 108.

H. L. (E.) 1885 METROPOLITAN BANK v. POOLEY.

March 26. EARL OF SELBORNE L.C.:—

My Lords, in the view which I take of this case it is not necessary to determine whether the opinion of the Court of Appeal, that the two actions brought by the respondent were not substantially between the same parties, was right or not.

The judges in the Court of Appeal do not seem to have addressed themselves (and I think your Lordships may presume that the course of the argument did not really direct them) to the other question, whether the action should be dismissed altogether as frivolous and vexatious.

According to the present rules of practice applicable to appeals to the Court of Appeal, it is the duty of that Court upon an appeal to make the order which ought to have been made by the Court below; and if it would have been right for the Court of Appeal, differing from the Divisional Court so far as related to the order which that Court had made, to go further and to dismiss the action altogether as frivolous and vexatious, your Lordships upon this appeal ought now to make the order which the Court of Appeal ought to have made. In my opinion the order which the Court of Appeal ought to have made was to dismiss the action altogether as frivolous and vexatious. Upon that point I entertain a very clear opinion.

Before the rules were made under the Judicature Act, the practice had been established to stay a manifestly vexatious suit which was plainly an abuse of the authority of the Court, although so far as I know there was not at that time either any statute or rule expressly authorizing the Court to do it. The power seemed to be inherent in the jurisdiction of every Court of Justice to protect itself from the abuse of its own procedure. Another reason why that should have been very rarely done before the recent rules is this, that if the objection was one which could be raised upon the face of the pleadings, that always might be done by demurrer. But when the rules of 1883 were settled and came in force, which they did before the present action was brought, it was thought that the formal and technical practice of demurrer might with advantage be abolished, and that more easy and summary, or at least equally summary, modes of applying to the Court to get rid of an action on the face of it manifestly groundless, might be

substituted. And by the 4th rule of Order xxv. of 1883 this is provided: "The Court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer; and in any such case, or in case of the action or defence being shewn on the pleadings to be frivolous or vexatious, the Court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

Under that rule it is manifest that the Court might have ordered this action to be dismissed on the same grounds as those on which a demurrer might formerly have been allowed, or if it appeared that the action was frivolous or vexatious. In this case the form of the application to the Court was that the action should be dismissed as frivolous and vexatious, and not on the ground that the pleading did not disclose any reasonable cause of action. Nevertheless it is an element of primary importance, in determining the question whether an action is frivolous and vexatious, to consider what sort of cause of action, if any, appears upon the face of the pleading. The plaintiff, Mr. Pooley, who instituted this action on the 7th of December 1883, is a bankrupt, and was a bankrupt for a considerable time before. In the view which I take of the case it is not material, but it is, I believe, the fact, that he is an undischarged bankrupt. But even if he had been discharged without having got rid of and annulled the bankruptcy as wrong ab initio, my impression is that it would have made no difference in this case. The facts with regard to his bankruptcy appear to be these, and there is no dispute whatever about them. He was adjudicated bankrupt on the 22nd of October, 1879, on the petition of a Mr. Toppin, who is one of the defendants to this action, but not an appellant to your Lordships. That was rather more than four years before the commencement of the present action. The plaintiff appealed against the adjudication, and that appeal, on the 13th of November in the same year 1879, was dismissed with costs, the plaintiff not appearing. But the matter did not stop there. It appears from an exhibit to an affidavit put in by Mr. Pooley himself, that on the 18th of February 1880 he examined or cross-examined in bankruptcy Mr. Cooper, the official liquidator of the Metropolitan

H. L. (E). 1885 METROPOLITAN BANK v. POOLEY. Earl of Selborne, L.C.

Bank, and that the conspiracy to procure his ruin (that is what he alleges in the present action) was fully disclosed by that examination. Whether he had before that time actually made his application to annul the bankruptcy is not clear. I think it very probable that he may have done so; but, whether it was before or after, he did make such an application, and he did not then make a default in appearance. Upon the 16th of July 1880 that application was heard and determined; it was dismissed with costs, and he never appealed from that dismissal. So that three and a half years before the present action was brought he was plainly in possession of all the materials on which his present complaint is founded; he used those materials, as it was right and proper that he should do if there was anything in them, to get rid of the bankruptcy; he went to the proper Court for that purpose, and the adjudication in bankruptcy was finally and conclusively affirmed.

Under those circumstances it is perfectly clear and certain, that Mr. Pooley, as a bankrupt and as a bankrupt irreversibly found to be so, has no locus standi to come into Court and to say what he does say by his statement of claim, that he "has suffered damage by the wrongful acts of the defendants in fraudulently and without reasonable cause procuring him to be adjudicated bankrupt," or to say, as he does in his writ, which is explained by that statement of claim, that he seeks "damages for fraud and conspiracy." I reserve for separate observation the other point which is insisted upon, namely, "maintenance."

It was settled as long ago as the case of *Whitworth* v. *Hall* (1), which was referred to in the argument, that in an action for maliciously and without reasonable cause suing out a commission of bankruptcy it must be averred and proved that the commission was superseded before the action was brought, and that for a reason which applies to other analogous cases. An action for malicious prosecution cannot be maintained until the result of the prosecution has shewn that there was no ground for it. If a man has been tried and convicted on that prosecution, and there is no writ of error brought and no reversal of the decision, such an action will not lie. And it is manifestly a matter of high

(1) 2 B. & Ad. 695.

public policy that it should be so; otherwise the most solemn proceedings of all our Courts of justice, civil and criminal, when they have come to a final determination settling the rights and liabilities of the parties, might be made themselves the subject of an independent controversy, and their propriety might be challenged by actions of this kind. It is therefore clear (and the learned counsel for the respondent found a difficulty in denying it in the course of his argument) that on that ground, namely, causing the plaintiff to be fraudulently and without reasonable cause adjudicated a bankrupt, there can be no pretence for the action. It is manifestly groundless, and even without the other facts, I should have been disposed to say manifestly frivolous. The adjudication stands; and, even if he had never litigated or disputed it, the fact of its standing would be a sufficient answer to this alleged cause of action. But when you find from the affidavits filed in the cause that he had litigated it with full knowledge of those facts, which if true and if his view of them were correct would be a sufficient reason for setting it aside, and that it was solemnly confirmed, and that this occurred two or three years before the action was brought, I am bound to say that I can conceive nothing more frivolous, I can conceive nothing more vexatious, than an action brought on that ground.

And that is really the sole substantial ground for the action; because, although he adds the word "maintenance" in the indorsement upon the writ, and states in the second paragraph of his statement of claim that the appellants, the Metropolitan Bank, gave to Topping, the petitioning creditor, an indemnity against his costs in the bankruptcy proceedings, and alleges that at that time the bank had no common interest in the bankruptcy proceedings or in the debt due to Toppin, and although in the fifth paragraph, founding himself on these allegations, he says that "by reason of those acts of the defendant he claims damages for the maintenance of such bankruptcy proceedings and otherwise as aforesaid," yet in reality I think it is quite plain that if the first ground fails the second ground must fail also. It was said by the respondent's counsel that in a recent case, to which he referred, of *Bradlaugh* v. *Newdegate* (1), it had been determined that an action

(1) 11 Q. B. D. 1.

H. L. (E.) 1885 METROPOLITAN BANK v. POOLEY. Earl of Selborne, L.C.

would lie for maintenance by one man of an action in the name of another who would not otherwise have brought the action, but who was induced to bring it by the solicitation and offer of indemnity of the person charged with maintenance. That may be true; but, as applied to the present case, there seem to me to be two considerations, which dispose of this allegation of maintenance, shewing that it can be no real or substantial ground for maintaining this present action. The first is this: maintenance, in the sense which the argument assumes, is not merely under some circumstances a civil wrong entitling the person injured to damages, but is a wrong founded upon a prohibition by statute which makes it a criminal act and a misdemeanor, and I apprehend it to be clear that the civil action for maintenance would not lie except against a person who was guilty of the criminal act. As with respect to the adjudication in bankruptcy, so with respect to this alleged maintenance, the present plaintiff has previously tried the matter, and in a more proper form; because on the 24th of August, 1881, as appears by the affidavits, he made a criminal charge for maintenance against Mr. Cooper, the official liquidator, who could alone be the agent in such a thing if it were done, and that charge was dismissed with costs. He charged Arthur Cooper and Francis Cooper his partner in business, Arthur being the liquidator, with this offence of maintenance, and the magistrate considered the case to be completely answered, and, as I say, dismissed the charge with costs. I will not cite what was said by the counsel, because it has nothing to do with the matter, though it very much expresses the sentiments which I think this proceeding is calculated to excite in your Lordships' minds. So that in proper form the application was made, and the criminal charge for maintenance could not be pressed further.

In my opinion the corporation, the Metropolitan Bank, was incapable of maintenance. Maintenance in that sense could not take place by a corporation in liquidation. A corporation in liquidation might be answerable under certain circumstances for the improper acts of its liquidator, its agent. If it had profited by those acts it would not be permitted to retain the profit—it would be chargeable no doubt in that respect, I suppose, even if

in liquidation. But this particular act of maintenance, which is criminal, and also in some circumstances the ground of a civil action, is an act which in my opinion the Metropolitan Bank in liquidation, the corporation as distinct from the individual liquidator, was incapable of committing. That is one reason. It may also be a question, whether, if this act, which upon the shewing of the plaintiff preceded the proceedings in bankruptcy, was an act amounting to a civil wrong against him, affecting him in respect, not of his person, but of his property, and in respect of which he had a right of action and was entitled to recover damages, and if that right of action was against the Metropolitan Bank, that as well as all other similar rights of action which he was entitled to at the time of the adjudication did not pass to the trustee in bankruptcy. So that, if any real damage had been sustained by him in respect of his property, and if there really was this right of action, he, as a bankrupt, would have no interest, after the adjudication, in that right of action. Therefore there is no right of action at all in him, and the whole thing is a bankrupt's action for matters in respect of which the bankrupt, not having got rid of or annulled his bankruptcy, could not sue.

I think that what I have already said would have brought me, if there were nothing to be added to it, to the conclusion that this was not only a groundless statement of claim, but was also frivolous and vexatious. But to that is to be added the fact, that the plaintiff brought another and a similar action in respect of the same matters (I do not know that maintenance was thought of at that time, but putting maintenance aside the whole substance of the complaint was the same) against other parties including the liquidator, I think in his personal capacity, on the 28th of July, 1880; and beyond all doubt the liquidator, if a wrong had been committed, would have been personally liable for it, and the corporation in liquidation, who could not do any such act at all otherwise than through its liquidator, if liable upon the principle which I have mentioned, namely, upon the principle that it had derived benefit from the transaction, or whatever else may be stated as the ground, could only be so upon the supposition that its liquidator had done the wrong which was alleged against him in that former action. That former action was permitted to proceed. Whether it might have been stopped or not

H. L. (E.) 1885 METROPOLITAN BANK v. POOLEY. Earl of Selborne, L.C.

it is not for us now to inquire. It proceeded and was brought to a conclusion. It was tried upon the merits, and in 1881, not quite three years before the present action was brought, it ended in a nonsuit upon the merits, the whole case entirely failing, and being adjudged against the bankrupt; and I am sorry to say that it appears that that proceeding of the undischarged bankrupt cost to the various parties £3000, of which £1800 was incurred by Mr. Arthur Cooper the liquidator of this corporation. It would be a scandal and disgrace to the administration of justice in this country, if such proceedings were permitted to be repeated, whether with some colourable variation of the dramatis personæ or not. Anything more vexatious than to allow, after that, a groundless action, upon such a statement of claim as this, by a bankrupt to go on at the risk of incurring £3000 more costs, I cannot conceive.

I therefore advise your Lordships that the appeal should be allowed, and that the order should be made which I think ought to have been made by the Court of Appeal, that the action be absolutely stayed as frivolous and vexatious.

I do not know that there is much use in giving costs against a bankrupt. Whether he can pay them or not I do not know, but I do not think that it is a case in which he can object that injustice is done to him if he is ordered to pay those costs, however little chance there may be of the appellants getting any of them from him.

LORD BLACKBURN:—

My Lords, I quite agree in the result to which the Lord Chancellor has come, that the order of this House ought to be to stay this action altogether, and (however little good may come of it) to order the respondent to pay the costs of the appeal.

At common law originally the judgment of the Court was always obtained either by a demurrer or any other proceeding which upon the record gave a judgment, or an issue was taken of fact and a verdict was found, and then a judgment was given upon the record. But from early times (I rather think, though I have not looked at it enough to say, from the earliest times) the Court had inherently in its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to

be vexatious and harassing—the Court had the right to protect itself against such an abuse; but that was not done upon demurrer, or upon the record, or upon the verdict of a jury or evidence taken in that way, but it was done by the Court informing its conscience upon affidavits, and by a summary order to stay the action which was brought under such circumstances as to be an abuse of the process of the Court; and in a proper case they did stay the action.

In the present case we are not any longer at common law. The Judicature Act has been introduced, and rules have been made under the Judicature Act. I agree in what the Lord Chancellor has said, that Order XXV., r. 4, of 1883, which he has read, and which I will not read over again, considerably extends the power of the Court to act in such a manner as I have stated, and enables it to stay an action on further grounds than those on which it could have been stayed at common law. The proceeding which is thus given, however, does require the Court to be satisfied that the action is frivolous or vexatious (I think that those are the words which are used in the rule), and then the action may be dismissed or it may be stayed by the Court in a summary manner without raising the question upon a demurrer or by an issue of fact. It is obvious to my mind that as regards both that which was done under the common law jurisdiction of the Court and that which may be done under the more extensive jurisdiction now given to the Courts, although it should not be lightly done, yet it may often be required by the very essence of justice to be done.

The summons taken out was "that this action be dismissed as frivolous, vexatious, and harassing, or," in the alternative, "that all proceedings herein be stayed until the costs in the action of *Pooley* v. *Royal Exchange Bank and Others* are paid."

The Divisional Court not having, I think, perceived, in consequence of not having had their attention called to it, that the new rule, which had come into operation in 1883, had extended their jurisdiction, thought that this was a case in which they had jurisdiction at common law, and if the case was properly made out upon affidavits they had jurisdiction. They also thought (I do not know whether they can be said to have decided) that whether the action was frivolous and vexatious or not, it was a

H. L. (E.) 1885 METROPOLITAN BANK v. POOLEY. Lord Blackburn.

strong and serious thing (and undoubtedly it was) for the Court summarily, in the exercise of their common law jurisdiction, against which there would originally have been no appeal, to stay the action altogether, and they thought that justice would be fully done if the order were that it should be stayed until the costs of the former action were paid. That was a thing which had been often done, assuming that it was a proper case for staying the action till the costs of the former action were paid. It would be a right thing to do that if it was a proper case. Whether it was the proper course to take in this case, whether the former action is shewn to be so much the same action, being against parties in the same interest as in the present one, that it would be a right thing to stay the action, it would require a minute examination of affidavits to say. But it is quite unnecessary to examine that, as we have a more extensive jurisdiction now given to the Courts, and this is, in my opinion, a very proper case for exercising that jurisdiction by staying the action altogether.

What is this action brought for? The statement of claim is that "the plaintiff has suffered damage by the wrongful acts of the defendants in fraudulently and without reasonable cause procuring the plaintiff to be adjudicated bankrupt." Then after some things which merely go to shew why it was maliciously and without reasonable or probable cause procuring him to be adjudicated bankrupt, he goes on to add, "The plaintiff, by reason of the before-mentioned acts of the defendants claims damages for the maintenance of such bankruptcy proceedings." What he means by that I am sure I do not know. I do not enter into the question of what are the grounds on which an action may be maintained for maintenance. I do not inquire further into that at all, but I simply say that here, upon the face of this claim, there are two things clear. If, according to the decisions which have been come to, a proceeding for suing out maliciously and without probable cause a commission in bankruptcy cannot be maintained so long as the commission in bankruptcy stands unreversed, if that be so, as long as the commission in bankruptcy stands, the first ground of claim, namely, "in fraudulently and without reasonable cause procuring the plaintiff to be adjudicated bankrupt," is clearly not a matter for which an action would lie,

unless he shews what on the face of the claim he does not shew, that the commission or adjudication in bankruptcy has been got rid of. As regards the second ground, assuming for the moment that it means something which was an injury to his estate for which an action could be maintained to recover damages, as long as the commission in bankruptcy remains, and his creditors are therefore entitled to take those damages, that would be a thing which the assignees would recover for the benefit of the creditors and not of the bankrupt himself. On both those grounds, on the face of this claim, it appears that there is no cause of action.

I do not think that it would necessarily follow that it was to be considered frivolous and vexatious merely because there had been a previous decision unreversed and unappealed against. For, I think I may say the last thirty or forty years, it has been considered good law that an action could not be maintained until the commission in bankruptcy had been got rid of. I can easily suppose that it might be the case that though that has long been considered to be law, yet the bankrupt being held to be acting frivolously and vexatiously might seek to raise the question and bring it to the House of Lords and have that decision reversed. That is possible enough, and therefore I do not think that it would necessarily be frivolous and vexatious. But under the new process which is now given the Court are entitled if the action is frivolous and vexatious to stay it, and for that purpose you are to bring in affidavits. And on the affidavits in the present case it appears distinctly that the not saying that the adjudication in bankruptcy had not been got rid of was no mere slip, but that the plaintiff himself had tried to have it set aside, and had had his application refused with costs, that he had tried to prosecute persons before a magistrate for what he imagined to be maintenance, but had been refused with costs; that he brought an action for a supposed conspiracy against half a dozen persons, and the result of that action was that he was defeated and nonsuited, and had £1800 to pay as taxed costs, which they could not get paid—that the plaintiff with all these matters before him has brought this action without paying a farthing of those costs. If that is not frivolous and vexatious and annoying I find great difficulty in seeing what can be frivolous and vexatious and annoying.

H. L. (E.)
1885
METROPOLITAN BANK v. POOLEY.
Lord Blackburn.

[His Lordship read and commented upon the affidavits.]

If it had been on demurrer it might have been said that there was some slip in not making the allegation; but now that it is upon the affidavits can it be reasonably contended that this action is (I am giving the words of the rule from memory) not frivolous and vexatious? Frivolous I have pointed out that it is, in the sense that unless all the decisions which have been come to hitherto have been wrong (which of course is possible) he has no ground of action. Vexatious it is if anything whatsoever can be vexatious. And why, therefore, this action should not be stayed absolutely I do not know.

The Court of Appeal thought that they were treating the matter at common law, and they thought that they were confined solely to the alternative on which the Divisional Court had gone. I do not inquire whether upon that assumption they were right or not. It would require a minute examination of the affidavits to decide whether they were right or not. But I do say that if their attention had been called to the extended jurisdiction which had come into force at that time they could hardly have avoided seeing that this was a case in which the action ought to be stayed altogether.

LORD WATSON:—

My Lords, I am of the same opinion. We are bound to assume that the proceedings for having the respondent adjudicated a bankrupt were taken with reasonable and probable cause, and that no ground exists for annulling the adjudication.

In these circumstances the respondent cannot maintain his claim for damages against the appellants upon the mere allegation that these proceedings were taken fraudulently or maliciously. If a claim for damages would lie against the appellants for maintenance committed in the course of these bankruptcy proceedings, as to which I entertain some doubt, the right of action for such damage was vested in the respondent's assignees.

I shall not advert to the other features of this case which have been already noticed by your Lordships. I can hardly conceive of an action which could be more justly described as frivolous and vexatious than the present. I think that this is a very

proper case for the application of the new rule, and I concur in the judgment proposed.

LORD FITZGERALD:—

My Lords, I do not intend to advert to the facts of the case, save to express my entire concurrence in this, that the action now before us is beyond question a vexatious and a harassing action and one which is frivolous in this sense, that upon the face of the pleadings it is manifest that the action never can be maintained. I apprehend that under such circumstances in applying the new rule which has been adverted to the only course to pursue is to stay the action altogether.

I should not say another word but that I was surprised in the course of the argument to find that any doubt could be thrown on the proposition that in an action such as this it was necessary to shew that the adjudication had been annulled. I had a very early recollection of the authorities proceeding in one uniform course and not leaving it open to entertain any doubt upon that proposition.

The action here is for "fraudulently and without reasonable cause procuring the plaintiff to be adjudicated bankrupt." That is the real action before us. The fourth paragraph (after two intermediate ones) is this: "The matters hereinbefore complained of," that is the procuring this adjudication to be made fraudulently and without reasonable cause, "were done in order to enable the defendants the Metropolitan Bank to possess themselves of the plaintiff's property or the greater part thereof, which they have wrongfully and fraudulently done;" and he claims £30,000 for that. Then the adjudication subsists and remains in full force. It is said that it was procured with the view to get possession of property, and it is for injury to property alone that this action is brought, whereas upon the face of it it is manifest that if the action were otherwise well founded the interest in that property would not be in the plaintiff, but in the assignees in bankruptcy.

But what I wish first to advert to is the case of *Whitworth* v. *Hall* (1), and the doubt which was thrown at the bar, if any doubt could be thrown, on the law there laid down. The reference to

(1) 2 B. & Ad. 695.

H. L. (E.) 1885 METROPOLITAN BANK v. POOLEY. Lord FitzGerald.

that case emanated from the Lord Chancellor, and did not come originally from the bar. It is remarkable that the question upon that case and the question upon the rule was not raised at all either before Mathew J., or in the Divisional Court, or in the Court of Appeal. I thought it well to look into the precedents as they stand; for, after all, upon a question of this kind precedent is everything; and having a vivid recollection of the old rules of pleading I went at once to Wentworth on Pleading, a book which, although now forgotten, was regarded in its time as of considerable authority, and as giving none but precedents which had stood the test of actual practice; and your Lordships will find in the 8th volume of Wentworth's Precedents, pages 313–315, the form of declaration in an action of this kind. The expression there used was "maliciously suing out a commission of bankruptcy;" but it is more properly expressed in modern practice to be "maliciously procuring the party to be adjudicated a bankrupt." At that time the bankrupt, or the person against whom a commission had been sued out, not surrendering became a felon and was liable to be treated accordingly; and Wentworth says (I mention that as expressly averred) that the plaintiff averred that at the peril of his life he had surrendered to that commission, and then he adds (this is the averment), "and the plaintiff saith that the said commission afterwards" on such and such a day "was duly superseded." The commission therefore was at an end; it was superseded and gone, and the plaintiff had a right then to bring an action for a malicious abuse of that procedure.

The precedents up to 1831 will be found to be uniform, although in an early edition of Chitty on Pleading there is a recommendation to add a count omitting the averment in question, but no serious doubt existed. Before the decision in *Whitworth* v. *Hall* (1) the point now before us arose in Ireland in the case of *Crean* v. *Hodgens* (2), and was very well argued. The action was for maliciously suing out a commission of bankruptcy and contained an averment "that the said commission was afterwards duly superseded," following the established precedent and putting in an averment which required to be proved, and proved by a writ of supersedeas. The plea was that the action had been

(1) 2 B. & Ad. 695. (2) Hayes's Rep. 184.

commenced by suing out a writ of common law subpœna, and that at the time of issuing that writ the commission was in full force and had not been superseded. To that plea there was a demurrer. The Court held the plea bad on special grounds, and added that the proper course for the defendant would have been to have pleaded traversing the supersedeas before the filing of the declaration, but the Court held the averment to be material and necessary for the maintenance of the action.

After that decision, but before it was printed, the decision in the case of *Whitworth* v. *Hall* (1), which has been adverted to, was published, and the learned editor of Hayes's Reports mentions with approval in a note the decision of that case. *Whitworth* v. *Hall* (1) will be found cited also in *Atkinson* v. *Raleigh* (2), and certainly with no mark of disapproval. It was an action for maliciously suing out a fiat of bankruptcy, there being an averment that the Court of Review afterwards annulled the fiat. The plea was, not guilty. It appeared on the trial that the fiat had been annulled by the Lord Chancellor and not by the Court of Review; so that there was what according to the then practice would have been a fatal variance. But after a verdict for the plaintiff, the defendant moved to enter a non-suit upon the ground that there had been no annulment of the fiat, inasmuch as it had been made by the Lord Chancellor in place of having been made by the Court of Review. It was however held that the plea of not guilty did not put in issue the due annulling of the fiat, and therefore the plaintiff obtained his judgment.

But the law upon this subject has been properly and scientifically put in a later case, *Munce* v. *Black* (3), shewing exactly how the law stands, and the ground upon which it ought to rest. That was an action on the case for maliciously by means of a false affidavit causing an injunction to be issued out of the Incumbered Estates Court under which the plaintiff was turned out of possession of his estate. There was a demurrer to the declaration because it did not shew the termination of the process of injunction in the Incumbered Estates Court. In fact it not only did not shew the termination of it, but shewed that it was in full

(1) 2 B. & Ad. 695. (2) 3 Q. B. 79.
(3) 7 Ir. C. L. R. 475.

H. L. (E.) 1885 METROPOLITAN BANK v. POOLEY. Lord FitzGerald.

force. Upon that demurrer the Court gave judgment for the defendant, and Pigot C.B. puts the reason thus, and it is the ground upon which it ought to rest and stand: "In an action for the malicious prosecution of proceedings where the particular proceeding is the immediate result of the adjudication of a Court of competent jurisdiction, the pleading is bad unless it shews that the proceeding is at an end;" and he adds at the conclusion of his judgment, "the case is one *primæ impressionis* to make a process, still remaining in full force and effect, the subject of a suit for maliciously putting in force the order of the Court. The case has not terminated. A proceeding emanating from that order of the Court, remaining unreversed, cannot be the subject of an action." So here, it appearing that this adjudication is still in full force, and the plaintiff complaining that by reason (that is the foundation of the action) of that adjudication his property has been taken possession of by the assignee and he is deprived of it, I say, in the words of Pigot C.B., that as long as that adjudication remains in full force and effect no action can be maintained at law for the proceedings under that adjudication.

Upon these two grounds I am perfectly clear that this action is not sustainable, that upon the face of it it cannot be sustained, and that there is no doubt whatever upon the law, and I am equally clear that it is harassing and vexatious.

Order appealed from reversed; declaration that the order of the Divisional Court ought to have been discharged, and an order made to dismiss the action against the Metropolitan Bank with costs, as frivolous and vexatious; action ordered to stand dismissed with costs accordingly; each party to pay his or their own costs in the Court of Appeal; the respondent to pay the costs of the appeal to this House; cause remitted to the Queen's Bench Division.

Lords' Journals 26th March 1880.

Solicitors for appellants: *Newman, Stretton & Hilliard.*
Solicitor for respondent: *Randolph Chamberlain.*

[HOUSE OF LORDS.]

ARTHUR JOHN SPACKMAN . . . . APPELLANT;

AND

THE PLUMSTEAD DISTRICT BOARD OF WORKS . . . . . } RESPONDENTS.

H. L. (E.)
1885
Feb. 26.

Building—Metropolis Management Amendment Act 1862 (25 & 26 *Vict. c.* 102) *s.* 75—"*General line of buildings*"—*Certificate of Superintending Architect conclusive.*

The certificate of the superintending architect of the Metropolitan Board of Works made under the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102) s. 75 and fixing the "general line of buildings" in a road is conclusive as to a building erected before the certificate is made; and on the hearing of a summons (issued after the making of the certificate) for an offence under s. 75 alleged to have been committed in respect of such building the justice has no jurisdiction to review the architect's decision or decide for himself whether the line fixed by the certificate is the true general line.

So *held*, affirming the decision of the Court of Appeal.

Simpson v. *Smith* (Law Rep. 6 C. P. 87) overruled.

APPEAL from an order of the Court of Appeal. The facts found in the case stated by the magistrate are fully set out in the report of the decision of the Court below (1). Briefly they were as follows:—

The appellant, being the owner of No. 7 Newton Terrace, High Road, Lee, on the 15th of January 1883 (the consent of the Metropolitan Board of Works having been refused) began to build upon the forecourt of No. 7, thereby extending the frontage of that house to the road. The respondents required him to desist, but he declined and proceeded. In February the appellant and a representative of the respondents appeared before the superintending architect of the Metropolitan Board of Works, and were both heard by him with reference to the position of the line of buildings; and on the 7th of March the architect, under sect. 75 of the Metropolis Management Act 1862, made his certificate with a plan annexed, whereby he "decided" that a certain line

(1) 13 Q. B. D. 878.

H. L. (E.) 1885

SPACKMAN v. PLUMSTEAD BOARD OF WORKS.

tinted pink on the plan was "the general line of buildings between two named points in High Road."

A summons having been issued under sect. 75 on the 9th of March, alleging an offence to have been committed on the 15th of January and divers other days, Mr. Marsham, the metropolitan police magistrate, heard evidence and viewed the premises, and decided that the building extended considerably beyond the general line of buildings as fixed by the architect in his certificate, and that the architect's line was the true line if the portions of the road considered by the architect were the only portions to be considered. But the magistrate dismissed the summons on the ground that in his opinion the building did not extend beyond the true general line of buildings, because in order to arrive at a general line it was necessary to consider further portions of the road beyond those which the architect had considered. The questions for the Court were 1, whether the magistrate was bound by the certificate as conclusive, or ought to have considered for himself what the true general line of buildings was; 2, whether he was bound as a matter of law in considering the general line of buildings to confine his attention to the limited portions of the road considered by the architect. If on either question his decision was wrong the appellant was to be convicted.

The Queen's Bench Division (Lord Coleridge C.J., Stephen and Mathew JJ.) held that the magistrate ought to have convicted, and reversed his decision. The Court of Appeal (Bowen and Fry L.JJ., Brett M.R. dissenting) affirmed the decision of the Queen's Bench Division (1).

Feb. 24, 26. *Arthur Charles* Q.C. and *A. M. Channell* (*McCall* with them), for the appellant:—

The two questions raised in the case turn entirely on sect. 75 of the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102), repealing sect. 143 of the Metropolis Management Act 1855 (18 & 19 Vict. c. 120). The first question is whether (as the respondents contend) the certificate of the architect is conclusive and binding on the magistrate. Sect. 75 enables the vestry to proceed against the builder; the vestry was a body

(1) 13 Q. B. D. 878.

independent of the architect; but that power is extended by 45 Vict. c. 14 s. 10 to the Metropolitan Board of Works itself, and that is a strong argument (as pointed out by Brett M.R. in the Court below) that the legislature cannot have intended to make the certificate of the architect conclusive, the architect being nominated and removable by the authority to whom is transferred the right of prosecution. In sect. 75 the words "so fixed as aforesaid" mean fixed by the architect subject to the decision of the magistrate. The architect may fix the line without seeing the place or hearing the parties; for there is nothing in the statute to compel him to do so, and it cannot have been meant to make a decision so arrived at absolutely conclusive. The words "such general line of buildings to be decided by the superintending architect" mean "decided subject to review by a justice of the peace."

The authorities are in conflict. In 1864 in *St. George's Hanover Square* v. *Sparrow* (1) (Erle C.J. Willes and Keating JJ., Byles J. not dissenting) the Common Pleas gave an opinion in favour of the appellant's view. In 1867 in *Bauman* v. *Vestry of St. Pancras* (2) the Queen's Bench (Cockburn C.J. and Mellor and Shee JJ.) took the opposite view, but the judgment was confined to the decision that the certificate was given in time, though only given the day before the hearing and after the summons was issued. In 1868 in *Wandsworth Board of Works* v. *Hall* (3) the architect gave his certificate after the erection of the building; the magistrates agreed with the architect as to the general line, and it was therefore unnecessary to decide the present point, but the Court thought there must be a general line before and independently of the architect's certificate. In 1871 in *Simpson* v. *Smith* (4) the Common Pleas (Bovill C.J. Willes, M. Smith, and Brett JJ.) held that the certificate was not conclusive, and that the magistrate could decide for himself. The magistrate ought to hear evidence on the question and decide according to his own opinion; but he cannot order the demolition if the building is

(1) 16 C. B. (N.S.) 209; 33 L. J. (M.C.) 118.
(2) Law Rep. 2 Q. B. 528.
(3) Law Rep. 4 C. P. 85.
(4) Law Rep. 6 C. P. 87.

H. L. (E.) 1885

SPACKMAN. v. PLUMSTEAD BOARD OF WORKS.

within the architect's line. As Willes J. said, that line "was evidently intended as a protection to the owner or builder, not as a scourge put in the hands of the architect" (1). *Vestry of Paddington* v. *Snow* (2) is the only other case on the subject. There Lord Coleridge approved the view of Brett J. in *Wandsworth Board of Works* v. *Hall* (3).

Sect. 62 of the Metropolitan Building Act 1855 (18 & 19 Vict. c. 122) provides for the appointment of the superintending architect by the Board. It is a great hardship on the builder if there is no appeal from the decision of the servant of the Board, so that upon a prosecution by the Board the builder must pull down in obedience to a certificate given after the building has been put up, and (as has been held) even after the prosecution began.

An ex post facto decision by a judicial tribunal is no hardship: but there is one when the builder has no means of finding out whether the architect will give a certificate which will make that an offence which otherwise would not be one. The decision of a magistrate is subject to the jurisdiction of the Queen's Bench Division, by prohibition, certiorari, and so on. Is the decision of an architect to be wholly free from judicial control? If the certificate was intended to be binding and conclusive nothing could have been easier than to say so. The builder has no means of compelling the architect to give his certificate beforehand, for there is no machinery provided for that purpose. If it had been intended to authorize the architect to give a judicial decision, some mode of procedure would have been enacted.

The second point is as to what the certificate is conclusive of. The architect has fixed not the general line but a particular line. He ought to have taken into consideration the buildings on each side of the buildings which he did consider. It is quite possible that if he had known that *Simpson* v. *Smith* (4) would be overruled and that his certificate would be final, he might have fixed a different line. His certificate being not a certificate of the general line is not a certificate within the meaning of sect. 75. Sect. 9 of the Act of 1882 by repeating verbatim the words

(1) 16 C. B. (N.S.) 218.
(2) 45 L. T. (N.S.) 475.
(3) Law Rep. 4 C. P. 85.
(4) Law Rep. 6 C. P. 87.

giving jurisdiction to the magistrate and leaving out the words "so fixed as aforesaid" which create the difficulty, shews that the legislature intended to adopt the law as laid down in *Simpson* v. *Smith* (1).

W. Willis Q.C. and *J. Lawson Walton* (Sir *F. Herschell* S.G. with them) for the respondents:—

The argument of the appellant involves strange consequences. Suppose the magistrate decides upon a different line. He has no power to order the building to be pulled down to his own line: his power is confined to order demolition to the line "so fixed as aforesaid," that is the architect's line. Therefore if the architect's line is behind the magistrate's line, he has no power to order demolition at all. If the architect's line is in front of the magistrate's, he can only order demolition to the architect's line. In either case the building remains in front of the line which the magistrate decides to be the true line. The decision of the architect involves a hearing of the parties: *Cooper* v. *Wandsworth Board of Works* (2). If the decision were given improperly without hearing the parties it would be no decision at all; and might probably be brought up by certiorari and quashed. The argument on the ground of hardship fails: the object being to secure uniformity and certainty for all parties concerned. The reasons given by the majority of the Court of Appeal are satisfactory and sufficient.

A. Charles Q.C. in reply:—

Those judges who have adopted the appellant's view did not say that the magistrate could order demolition to his own line if the architect's line is in advance of the magistrate's line. In that case he would simply dismiss the summons and the matter would go back to the Board. The architect might then adopt the magistrate's line, and obtain an order for demolition to that line. The difficulty put contra would therefore not arise. The intention was to give the builder a double protection so that the building could not be demolished unless the architect and the magistrate agreed that it ought to be.

(1) Law Rep. 6 C. P. 87. (2) 14 C. B. (N.S.) 180.

H. L. (E.) 1885 SPACKMAN v. PLUMSTEAD BOARD OF WORKS.

EARL OF SELBORNE L.C. :—

My Lords, your Lordships have thought it desirable to hear this case through all the arguments, having regard to the state of authority upon the matter. Very eminent judges have differed in opinion upon this question. I do not count them upon one side or upon the other, because of the maxim "ponderantur, non numerantur." But it was thrown out in the course of the argument for the appellant that your Lordships ought to reverse the judgment of the Court of Appeal and of the Queen's Bench Division merely because the state of the authorities was as the learned counsel for the appellant have represented. A more hopeless suggestion I never remember to have heard. The state of authority is this, that the Court of Common Pleas on more than one occasion expressed an opinion favourable to the view now submitted by the appellant, and adhered to that opinion though a contrary opinion was expressed unanimously by three judges in the Court of Queen's Bench. They adhered to that opinion not without the intimation of an opposite view by one of their most distinguished members. In that state of authority the matter came before the Courts in this case; and there were two judgments, both in favour of the respondents, one of them the judgment of the Divisional Court, which was unanimous, and the other a judgment of two judges to one in the Court of Appeal. For the appellant in that state of authority to say that your Lordships have any other duty to perform than to decide as well as you can the question of law upon the merits, which really turns altogether upon the construction of the statute of 1862, is, as I said before, a very hopeless contention.

I will now look, as I think your Lordships must, to the words of the statute, and see what according to the ordinary principles of construction is their reasonable and natural meaning. I will not in the first instance refer to the earlier Act of 1855, though when I come to consider some of the reasons which have been given on the appellant's part, I may have occasion to do so. Clause 75 of the Act of 1862 may be divided into what I may call four parts. The first contains the words of prohibition which constitute an offence; the second contains the words providing for a complaint founded on that offence, which is to be made to a

justice of the peace; the third relates to the manner in which the justice of the peace is to proceed; and the fourth to the order which he is to make.

Now the words which constitute the offence are, as I conceive, those which begin thus—"That no building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate"—and which end with the words, "such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being." Those words which your Lordships have to construe enter into the constitution, I will not say of the offence, because the offence is of course the act done by the offender, but the constitution of the prohibition on which the offence is to be founded; and if the prohibited thing is done, the offence primâ facie is committed. The word "decided" has a plain, intelligible, and natural meaning, unless displaced. In the first place it enters into the definition of the circumstances which are to exist before an offence can be committed; secondly, "decided" implies that there is matter which may admit of difference, which may require determination. Primâ facie that would mean determination so as to bind those who are to be affected by it. And if the legislature says that a certain authority is to decide, and makes no provision for a repetition of the inquiry into the same matter, or for a review of the decision by another tribunal, primâ facie, especially when it forms, as here, part of the definition of the case provided for, that would be binding.

What I have said upon that subject may, I think, be illustrated by a class of cases different in this respect, that they depend upon contract and not upon statute, but which may very well be applied to illustrate the operation of such words in a statute, bearing in mind that a statute of this kind made in the public interest, and not without a fair and equitable view of the right of all parties, is something higher than contract, and primâ facie there is no reason whatever why we may not proceed upon and adopt the same principles which the law would apply to contracts. In *Scott* v. *Avery* (1) the question had to be considered

(1) 5 H. L. 811.

H. L. (E.) 1885 SPACKMAN v. PLUMSTEAD BOARD OF WORKS. Earl of Selborne, L.C.

upon the general rule of law that people could not by contract oust the jurisdiction of Courts of Justice, on which had been founded a series of decisions, independent of course of recent statutes, as to the extent to which the Courts would or would not enforce agreements to refer questions capable of being litigated in the Courts to arbitration. The Court had to determine whether that principle was applicable to a case in which it was part of the contract itself that the right of action, so to say, before it could arise was to be ascertained by the decision of arbitrators; in which the right itself, the constitution of the right, was not to be perfect and absolute under the contract until arbitrators had decided something. The Court held that to be perfectly good, and that in that case, until such a decision had been made, no right upon which an action could be founded arose. Lord Campbell, in the course of his judgment in this House, referred to a case specifically of a different kind, which however he thought identical in principle, *Brown* v. *Overbury* (1), which "was an action on a horse-race. The winner, who had contributed to the sweepstakes, said that his horse had won, and brought an action against the stakeholder to recover the stakes. But it was a condition of the race that if any dispute arose the stewards should decide. He first attempted to say that the stewards had decided; but it turned out that the stewards had not decided, for they differed in opinion. Then he attempted to shew that his horse had won. But the judge held that he could not go into that; that even if the horse could clearly be shewn to have won, the action had not accrued till the arbitrators—the stewards—had determined; and so the plaintiff was nonsuited. That case was brought before the Court of Exchequer, and the judges of that Court unanimously concurred in the ruling of the judge at Nisi Prius" (2).

It seems to me that it is plainly to be inferred from the language of the statute, that, before the offence can be made the subject of any controversy, and in order to determine whether an offence has been committed or not, this material question, What is the general line of buildings, must be decided by the superintending architect. There must be a general line of buildings;

(1) 11 Ex. 715. (2) 5 H. L. 854, 855.

otherwise there can be no transgression of the prohibition against building at more than a certain distance from that line. As that general line of buildings might under certain circumstances admit of controversy, the legislature thought it necessary to say how it should be settled and decided, and it accordingly has said so; and, if there were no more than that, I should say that the general line of buildings mentioned in this section is, and can be nothing else than, a general line decided, in case of controversy or difference between the person who wants to build and the Metropolitan Board, by the architect of the Metropolitan Board.

Then the section proceeds to enact that "in case any building, structure, or erection be erected or be begun to be erected or raised without such consent, or contrary to the terms and conditions on which the same may have been granted, it shall be lawful for the vestry of the parish or the board of works for the district" (a later Act has added the Metropolitan Board) "to cause to be made complaint thereof before a justice of the peace." What is the subject of the complaint? In the case in which the consent previously mentioned is necessary (for that, although not expressed with the fullness with which it might have been expressed, is unavoidably to be inferred from the word of reference, "such"), the complaint is made, not of building beyond a certain line, but of building without the requisite consent. Of course if no line of buildings has been laid down, the complaint will fail, because the words requiring consent cannot be applied to the case; but if the line has been laid down, then with reference to that line a certain consent is necessary, and the whole complaint is of building without the requisite consent.

Then the justice is to issue a summons requiring the party to appear and answer the complaint; and then, "if at the time and place appointed in such summons the said complaint shall be proved to the satisfaction of the justice before whom the same shall be heard, he shall make an order." On those words, and on those alone, "if the said complaint shall be proved to the satisfaction of the justice," the argument is founded that the justice is to consider for himself what line ought to be laid down as the general line of buildings in the place, street, or row, and that, if he does not agree with the line laid down by the architect he is

H. L. (E.) 1885 SPACKMAN v. PLUMSTEAD BOARD OF WORKS. Earl of Selborne, L.C.

to act upon his own view. The thing which he is to consider is, whether there has been a building without consent or in violation of the terms on which consent may have been given. No doubt in order to make that out, a good many things must be proved before him; and one thing to be proved is, as Fry L.J. points out, that the architect of the Metropolitan Board of Works has decided the general line of buildings. If that has not been done the complaint will be dismissed; but if it has been done, then that part of the circumstances which under the prohibitory portion of the clause are necessary to make out the case of the complainant is proved; and there is not a single word to say that the justice is to go into the question. That being proved, and it being also proved that the prescribed distance from that line has been exceeded, and that there has been no consent, or that the terms of the consent have not been adhered to, it is not to be inferred that, (everything which is necessary to shew a prohibition of the act being proved,) he is to go into something more, for which no authority or jurisdiction is expressly given.

But if it were necessary, we have more; because the fourth part of the clause, which relates to the order to be made by the justice, is this. Upon this proof he "shall make an order in writing on such owner or occupier, builder or person, directing the demolition of any such building or erection or so much thereof as may be beyond the said general line so fixed as aforesaid." The only preceding words which fix the line at all are these, "such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being." So that it is plain upon the face of the Act, that the justice is to proceed on that line "so fixed as aforesaid," fixed by the architect; and, as I understand the reasoning of the learned judges who have taken the view that the magistrate may himself go into the question of what line ought to be fixed, it appears to me to result in something very strange, in what I may describe as the theory of two lines, both to be considered by the justice in the discharge of his duty, one his own line, and the other the architect's line. If we were to regard one line and not both of them, at least a consistent interpretation would be given. Only one line is spoken of in the clause, "the said general line so fixed as aforesaid;" and, as I

read the opinions by which the judges in the Court of Common Pleas endeavoured to reconcile their view with the words of the statute, and to obviate what seem to me the very just criticisms made upon them by Cockburn L.C.J. and the other judges of the Court of Queen's Bench, they say, that they do read the words "the said general line so fixed as aforesaid" as referring to the architect's line, and that they hold that, if the architect's line is in advance of the justice's line, then the justice can only order the buildings to be demolished down to the architect's line, though the real excess of the prescribed distance from what the justice holds to be the true line may be still greater—that he is bound to stop there. But supposing, on the other hand, that the justice's line is in advance of the architect's line what is he to do? The case is one of some excess, which according to the general policy of the statute ought to be abated. The justice is bound by the architect's line; he cannot order a demolition except with reference to the architect's line; but if his own line is in advance, the appellant's counsel say that he is to dismiss the summons. Then it appears to me that matters would come to a regular dead lock. The statute nowhere says that what a justice upon such a summons may have determined is to bind the architect. And when the statute says that the architect is to decide the line of building it appears to me to impose upon him a duty to decide it to the best of his judgment independently and impartially. Accordingly, it is suggested by the appellant, that if the summons is dismissed under the circumstances which I have stated, on this theory of a double line, the matter is to go back, and the architect is to reconsider his decision. But supposing that the architect adheres to his decision, and repeats it in the same or in another case, then the same process is to be repeated. The matter goes to the justice, who is absolutely bound, as to any order which he is to make, by the architect's line, and can only make it with reference to the architect's line; and therefore I say, if the justice and the architect do not agree, the object of preventing undue encroachment upon the frontage, which is an object evidently thought important by the legislature, beneficial to the public, and beneficial to the adjoining owners, or at all events proper to be provided for, becomes entirely defeated.

H. L. (E.) 1885 SPACKMAN v. PLUMSTEAD BOARD OF WORKS. Earl of Selborne, L.C.

The learned counsel have argued the case extremely well, as might have been expected. I think it was Mr. Channell who particularly insisted upon the argument from silence as to how the architect was to proceed. It appears to me that that argument is of no greater weight under such a clause in such a statute than it would have been under such an agreement as that which I have read, and which was in question in the case of *Brown* v. *Overbury* (1), where it was a condition that if a dispute arose the stewards should decide. No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter, and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice. But it appears to me to be perfectly consistent with reason, that the statute may have intentionally omitted to provide for form, because this is a matter not of a kind requiring form, not of a kind requiring litigation at all, but requiring only that the parties should have an opportunity of submitting to the person by whose decision they are to be bound such considerations as in their judgment ought to be brought before him. When that is done, from the nature of the case, no further proceeding as to summoning the parties, or as to doing anything of that kind which a judge might have to do, is necessary. Therefore this argument as to silence does not appear to me to be one of any real weight, and I adopt without repeating them the observations upon it which are made by Fry L.J. (2).

But the great respect which I feel for those who have taken a different view makes it necessary that I should advert to some considerations, which have weighed with the learned judges who have adopted the appellant's view. The first reason for taking

(1) 11 Ex. 715. (2) 13 Q. B. D. 896, 897.

that course is that which is several times repeated by the learned Master of the Rolls, namely, that the construction which would make the architect's decision of this matter final would work manifest and gross injustice. I am not able to follow the grounds on which that conclusion is arrived at. Why should it be unjust? If for public interests it is desirable to prevent one man from doing what may be injurious, perhaps by unduly contracting the public space, to the health or the light of his neighbours, or, at all events, injurious to his immediate neighbours by interfering with the amenity of their residences and the external beauty and appearance of a line of buildings in a public street, why should it be unjust that the legislature should have enacted a reasonable and definite way of deciding that question without litigation? Is it not right?

But then it is said to be unreasonable that the architect of the Metropolitan Board of Works should be selected for this purpose, because he is their servant and may be supposed to be under their influence. I do not follow that argument either. Who are the Metropolitan Board of Works? They are a very important public body established by the legislature for the general superintendence of public interests and the aggregate or several aggregates of private interests which ought to be regarded in matters relating to the metropolitan district. They are disinterested, and it is to be presumed of them, as primâ facie it should be of all public functionaries, that they can be trusted with the powers and the duties which have been confided to them. Why should it be supposed that such a board would exercise undue pressure or influence for any sinister purpose, or otherwise than is consistent with their duty, upon the architect, even if he ought to be denominated their servant and as under their influence, for the purpose of leading him to do something which is unfair or wrong? I do not see it; I do not believe it. I think that there is no ground for such a suspicion or surmise. Nor does it appear to me to be quite free from fallacy to describe the architect as that sort of servant who primâ facie may be thought to be liable to undue pressure or influence from his employers or superiors. He is a statutory officer, whom the same statute, which constitutes the Metropolitan Board of Works and gives them powers,

H. L. (E.) 1885 SPACKMAN v. PLUMSTEAD BOARD OF WORKS. Earl of Selborne, L.C.

appoints as a proper officer to take part in the execution of those powers. He must be a man of intelligence, skill, and position. All the presumption is against the idea that when upon himself and not upon his employers a duty is imposed by the legislature, he would discharge that duty partially, for the purpose of pleasing his employers, even if there were more ground than in this case there possibly can be for suggesting any motive in the employers which might lead them not properly to discharge their duty. I cannot, therefore, look upon that argument as one of weight.

Then there is the question, whether anything turns upon this matter being determined after the building is erected. The legislature has not said either that the decision must be made before the building is erected, or that the decision must be made after the building is erected. It is clear therefore, upon the words of the legislature, that it may be made before or after; and if the person who builds may be put to some disadvantage, and may incur some risk, supposing the decision not to be made until after the building is erected, whose fault is that? I conceive that it is his own. He knows that he is building in a street, place, or row of houses within the meaning of this clause, of which he must be taken to have notice. He knows that if he builds beyond the prescribed distance of the general line he will be liable to certain consequences unless he gets the consent of the Metropolitan Board; and he knows that he will be bound by the general line when decided or fixed in the manner which the statute prescribes. If he wishes to be safe, what has he to do? Simply to ascertain what that general line is before he builds; and the statute points out to him how that is to be done. He is to get the decision, and he may apply to the proper authority for it. If it is decided afterwards, and he has to pull his building down, whom has he to blame but himself? He is in that plight. When the nature of the subject is regarded, there is a considerable preponderance of reason in favour of a decision of the matter by such an authority as the architect, rather than by the particular justice of the peace before whom any particular complaint may be brought. In the first place, let us consider the nature of the fact to be determined. The Master of the

Rolls has spoken of the statute as assuming that there is a general line in fact. With certain qualifications I see no reason to differ from that. But that general line in certain circumstances may be one which the facts existing independently of some exercise of judgment are not enough to determine. Nothing can better illustrate it than the difference which in this case has existed between the magistrate and the architect. What is that difference? It turns upon the extent of the area in the road, the street, or the buildings, which is to be taken into account, and from which, measuring in a certain way, the matter is to be determined. The architect has practically treated the row of continuous or nearly continuous buildings as all that he ought to consider for this purpose. The magistrate has been led to extend his consideration much further right and left; but why he should do so, and then stop at the particular points at which he does stop does not very clearly appear, certainly not, I think, from anything which is already determined in rerum naturâ. So that, as to the extent of the space along which a line is to be laid down there is a necessity here for some exercise of judgment. With regard to the line itself within that space, if there is a row of houses along the whole of that space built in a regular mathematical line as to which each person can have no doubt, the fact is already determined, and there is no further room for judgment. But if the buildings within that space are irregular, if one house projects beyond another, or one block of houses projects beyond others, or if there is anything breaking the line, then in the nature of the case there is need of some judgment. And what better judgment than that of the architect of the board, an expert in matters of this description, can be conceived? Is it à priori so plain, as to alter what otherwise would be the proper construction of the statute, that a justice of the peace is a better and more competent judge of such matters than an architect?

Under the Act of 1855, the legislature, without saying how that line was to be ascertained, had authorized the vestry or the district board to pull down any buildings erected beyond that line, in other words erected beyond what they judged to be that line; and then, if the propriety of their action were questioned, an action of trespass had to be brought against them, and the

H. L. (E.) 1885 SPACKMAN v. PLUMSTEAD BOARD OF WORKS. Earl of Selborne, L.C.

jury would have to determine, after the buildings had been erected and after they had been pulled down, whether the board had or had not exercised a reasonable judgment upon these questions. The legislature thought that that was not a satisfactory state of the law, and they altered it in the Act of 1862. First, they took the cognizance of the matter from a jury altogether, and secondly, they provided for the decision and the fixing of the line; and now we are asked to make that decision subject to the review of a justice of the peace, and if he does not agree with the architect the line is to be unfixed, and the mode of determining it provided by the statute is to go for nothing.

Let us see what are the comparative conveniences and inconveniences of the one construction and of the other. I have already pointed out that, if the architect is to decide, the justice can do nothing except keep to the architect's line; and if he dismisses the summons the architect cannot be compelled to go against his own judgment. If the justice is to determine the matter, then you may have a varying judgment. Mr. Marsham thought that he ought to go a considerable distance to the right and left, and to take in the stables and the chapel. An exactly similar question might come before another justice as to another case within those limits, and he might say, "I cannot agree with that view. I am not bound by Mr. Marsham's decision. I think that the line is different." He might agree with the line of the architect. So that you have a case in which the very object is uniformity, and in which unity of judgment is desirable; you have the one construction providing for that uniformity and unity, as far as may be, by committing the decision to a man in the position of the architect of the Metropolitan Board of Works, a competent skilled person, who is to decide in every such case; whereas in the other case many complaints might be made before as many justices of the peace, and there would be no provision for securing uniformity at all.

Then there is another point. If the matter is to depend upon the justice, the builder and the Board cannot go before the justice until the building has been erected, and you have the same inconvenience as under the Act of 1855; whereas, if the architect is to decide, the two parties may settle any question before

the architect, before any expense has been incurred or anything has been done.

These considerations appear to me to shew not only that there is no injustice, but that there is no unreasonableness in the construction of the clause which has been adopted by the majority of the learned judges below; and if I were to trust my own opinion, I should say that there is a considerable preponderance of reason in favour of that construction. It seems to me to be collected from the true interpretation of the words which the legislature have used; and the judges from whose decision this appeal is brought have thought that it was right.

For these reasons, I propose to your Lordships to affirm the order appealed from, and to dismiss the appeal with costs.

LORD WATSON:—

My Lords, I have listened very attentively to the arguments of the appellant's counsel, in deference to those eminent judges of the Common Pleas with whom these arguments have on various occasions found acceptance, but I cannot say that they have raised any doubt in my mind that the judgment under appeal is right.

The 75th section of the Act of 1862 gives to the owner of land abutting upon a street or road, as I read the section, an absolute right to build within two limits varying according to circumstances. If the building line be at a distance of more than fifty feet from the highway, then he has a right to build up to that fifty feet irrespective of any building line existing. If, on the other hand, the general line of buildings in the street be at a distance of fifty feet (or less) from the highway, that general line is the limit of his approach towards the highway. Within these two limits his right is absolute. The limit of fifty feet is a hard and fast line drawn by the legislature. The other, the general building line, may or may not be in existence as a very obvious fact; or it may in some localities and under certain circumstances be a fact requiring to be decided upon a due consideration of these circumstances; and accordingly the legislature, with a view to that particular line being indeterminate in the sense which I have expressed, have prescribed that it shall be decided

H. L. (E.) 1885

STACKMAN v. PLUMSTEAD BOARD OF WORKS

Lord Watson.

by the superintending architect of the Metropolitan Board of Works. The first part of the section which implies a license to owners to build up to these lines also contains (and that is the substantive part of the enactment) words of prohibition; it prohibits building between one or other of these lines, as the case may be, and the highway, without the consent of the Metropolitan Board. I need not deal with the case of the building line being more than fifty feet from the highway, but will confine myself to the case before the House, where on the admission of both the parties the building line is not beyond that limit.

Confining myself to the prohibition which applies to such a case as that, the plain words of enactment contained in the section appear to me to run thus, that it shall not be lawful to build, without the consent of the Metropolitan Board of Works, nearer to the highway than the general line of buildings to be decided by the superintending architect of the Board. That is the prohibition, referring to a particular line, and that the line to be decided by the architect of the Metropolitan Board of Works. Then the clause proceeds to declare what the offence is, to be tried by the magistrate, and to confer power upon the magistrate to try the offence, and upon its being proved to give an appropriate remedy. Well, the offence in respect of which a complaint may be presented is building without such consent, that is to say, building without consent upon that area where it is prohibited, namely, the space intervening between the line decided by the architect of the Metropolitan Board of Works and the highway; and that is the substance of the complaint which the magistrate is to try. If he is satisfied that the complaint is proved, and that buildings have been erected upon the area beyond that line and without consent, then he is empowered to order demolition of the buildings in so far as they may be beyond the line "fixed as aforesaid." That I take to be the line fixed by the architect of the Metropolitan Board of Works, excess beyond which line is prohibited and declared to be the matter of complaint to be tried before the magistrate.

I listened to the appellant's argument in the expectation of being directed to some words of doubtful import and susceptible of a double meaning. So far as I can judge, the words of the

section, to which I have referred, have one meaning and one only, and upon these leading words, which enact the prohibition, which constitute the offence, and which direct the remedy, there is no ambiguity whatever. They have a plain and ordinary meaning, to which effect has been given by the Courts below in this case, and as far as I see they have no secondary meaning such as that suggested. The suggestion is that in the language of the clause which confers upon the magistrate jurisdiction to try the complaint you can find expressions which may be amplified so as to override those other words enacting prohibition, defining the complaint, and giving the remedy. And what are these words? "If at the time and place appointed in such summons the said complaint shall be proved to the satisfaction of the justice." Now it is said that you may read these words as signifying that the justice is to retry everything which has been decided before. But a more singular suggestion for the construction of a clause in an Act of Parliament I never heard. That is a relative provision; you must refer back to the preceding words of enactment for the purpose of finding out what the complaint to be tried is, and you cannot by putting an ingenious construction upon its language use that provision to qualify and override previous plain words of enactment from which the provision by reference takes its meaning.

Therefore I think this is not a case in which, upon considerations of hardship, we can put upon the plain language of the clause a meaning which is not the primary meaning of the words used by the legislature. Even if the intrepretation of the clause according to its primary meaning were attended with such hardship as some learned judges have supposed, I doubt whether it could be seriously entertained as a reason for refusing to give their proper meaning to the words of the clause; but as far as I am concerned I am not satisfied that any such hardship exists. It does not appear to me that a decision by a gentleman in the position of the superintending architect of the Metropolitan Board of Works is likely to be less favourable to the interests of all parties concerned or is less likely to attain the ends of justice than a series of decisions by a number of different district magistrates.

H. L. (E.) 1885 SPACKMAN v. PLUMSTEAD BOARD OF WORKS.

I agree with all the observations which have been made by the Lord Chancellor, and I concur in the motion made by his Lordship.

LORD BRAMWELL:—

My Lords, I adopt the judgment of Mathew J. and with one exception will add nothing to it. He says: "The effect of the decision of the Common Pleas appears to me to be to strike out of this section the very significant words, 'the general line of buildings so fixed as aforesaid.' With deference to the very great judges who pronounced the decision in the Common Pleas,"—and I add—to the Master of the Rolls, "I consider that there is no ground whatever for discarding those words. I think that those words were inserted advisedly for excellent reasons, and that we must give effect to them." (1).

LORD FITZGERALD:—

My Lords, I concur in the judgment delivered by the noble and learned Earl on the woolsack, and I will add nothing to it.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 26th February 1885.

Solicitors for appellant: *Saw & Son.*
Solicitor for respondents: *George Whale.*

(1) Shorthand writer's notes printed in the papers before the House.

[HOUSE OF LORDS.]

WILLIAM SMITH AND JAMES ROBINSON HANCOCK . . . . . } APPELLANTS;

AND

JOHN CROPPER AND OTHERS, TRADING AS "H. S. CROPPER & CO." . . . . . } RESPONDENTS.

H. L. (E.) 1885 March 17.

Letters Patent—Estoppel—Particulars of Objection delivered by one of two Partners in Action against both—15 & 16 *Vict. c.* 83 *s.* 41.

If a patentee becomes bankrupt, and his trustee in bankruptcy assigns the patent the patentee is not estopped from afterwards denying the validity of the patent, as against the assignee.

So *held*, affirming the decision of the Court of Appeal.

A patentee having gone into liquidation his trustee in liquidation assigned the patent. The patentee afterwards went into a trade partnership with S. The assignees of the patent brought an action against the patentee and S. for an injunction and damages for infringements of the patent alleged to have been committed in partnership. The defence alleged the invalidity of the patent, and the defendants delivered particulars of objections, viz., that the defendants would deny the infringement, and that the defendant S. would rely on their objections to the validity of the letters patent on the ground of want of novelty and insufficiency of the specification:—

Held, reversing the decision of the Court of Appeal, that under 15 & 16 Vict. c. 83 s. 41 it was not necessary for every one of two or more defendants defending in the same interest to deliver particulars of objections, and that the patentee was not precluded from setting up at the trial the invalidity of the patent on the ground of want of novelty and insufficiency of the specification.

APPEAL from an order of the Court of Appeal (1).

In 1873 letters patent were granted to the appellant Hancock for an invention of improvements in bobbin net or twist lace machines. In 1876 Hancock went into liquidation, and in 1877 his trustee in liquidation assigned the letters patent to the respondents. In 1880 Hancock went into partnership with the appellant Smith as lace machine manufacturers. In 1881 the respondents brought this action against the appellants claiming an

(1) 26 Ch. D. 700.

H. L. (E.) 1885 SMITH v. CROPPER.

injunction, and damages for infringements of the patent alleged to have been committed by the defendants in partnership.

The appellants' defence alleged (inter alia) that the patent was void ab initio, and denied that the alleged invention was at the date of the patent new or of public utility. The respondent's reply alleged that the appellants were estopped from disputing the validity of the patent. The appellants afterwards having obtained leave to be treated as having severed in their defence delivered the following particulars of objection:—

"Take notice that at the trial of this action the defendants will deny that they have infringed the letters patent in the statement of claim, and the defendant Smith will rely on their objections to the validity of the said letters patent on the ground of want of novelty and insufficiency of the specification and that the matters claimed or some of them were not good subject matter; and will further contend that the said invention as described and claimed in the specification of the said patent or material parts thereof were prior to the date of the said patent publicly used at the times and places and in the manner hereinafter more particularly set forth, that is to say" &c.

The respondents afterwards took out a summons "that the defendants may be ordered to deliver to the plaintiffs further and better particulars in writing of their objection to the plaintiffs' letters patent" &c. &c.; "and that unless such particulars are delivered within seven days the defendants may be precluded from giving evidence at the trial of this action in support of their said particulars of objections."

At the trial of the action Pearson J. held the patent valid and granted an injunction, with a reference as to damages, which were afterwards assessed.

On appeal the Court of Appeal (Cotton, Bowen and Fry L.JJ.) discharged the judgment of Pearson J., declared the patent void, and dismissed the action as against the appellant Smith; but inasmuch as the appellant Hancock had not given any particulars of objection granted an injunction against him, and ordered that the plaintiffs be at liberty to retain against Hancock the damages which had been paid by both defendants (1).

(1) 26 Ch. D. 700.

From this order the defendants appealed.

March 16, 17. *T. Aston* Q.C. (*Goodeve* with him) for the appellants. The appellants are partners, and as regards Smith the patent has been held invalid, but Hancock is restrained from using it, though it has been held void ab initio, and though the user and infringement, if any, by the two appellants is the same. If a patent is declared void no person can be liable in damages for a wrongful manufacture of the article, and no injunction should issue.

In point of fact sufficient particulars within the statute 15 & 16 Vict. c. 83 s. 41, requiring the defendants to give particulars of their objections to the patent, were given by the pleadings, in which the defendants denied that the invention was new or of public utility. If sufficient particulars are given to prevent the plaintiffs from being taken by surprise at the trial, it does not matter whether they are given in the statement of defence or by a separate document, if the statute is substantially complied with. See *Finnegan* v. *James* (1); *Needham* v. *Oxley* (2). In this case it cannot be alleged that the plaintiffs were taken by surprise as the patent was declared void on the evidence of their own witnesses in cross-examination. The defence need not be pleaded in any particular form if the plaintiff is in fact informed of the points on which the defendant relies. Besides, in a case such as this, where the use of the particular article has been very general and the objection is within the plaintiffs' own knowledge, particulars need not be given.

On the motion by the defendants for leave to sever their defences, Kay J. appears to have taken the view that the defendant Hancock, being the original grantee of the patent, was estopped from denying its validity; but as to this see *Heugh* v. *Chamberlain* (3) and *Goucher* v. *Clayton* (4). The particulars were in fact stated by Kay J. in the schedule to his order, and the form is peculiar, "the defendants will deny that they have infringed &c., and the defendant Smith will rely on *their* objections to the validity &c."

Under the statute the only consequence of improper delivery

(1) Law Rep. 19 Eq. 72.
(2) 1 H. & M. 248.
(3) 25 W. R. 742.
(4) 34 L. J. (Ch.) 239.

H. L. (E.) 1885 SMITH v. CROPPER.

or non-delivery of particulars is that evidence in support of the particular objections cannot be received. [He was stopped by the House.]

Chadwyck Healey (*H. Davey* Q.C. and *Cann* with him) for the respondents, was asked to address his argument to the questions whether, in the case of two defendants in a common interest, the statute requires that each should deliver separate particulars; and whether, under the circumstances of this case, the respondents were entitled to the relief against Hancock given by the Court of Appeal.

On the proper construction of the statute the word "defendant" must mean every defendant on the record, irrespective of their rights inter se as partners or otherwise. It is a case of first impression, the point has never arisen before, nor is it likely to arise again, but the view taken by the majority of the Court of Appeal was correct.

[EARL OF SELBORNE L.C.:—You must make out that the statute requires every defendant in the same interest to deliver separate particulars, even if he be a bare trustee with no beneficial interest, or abroad, or even hostile to his co-defendants.]

[LORD WATSON:—The object of the statute appears to have been fully complied with here; it is only intended to prevent surprise.]

The effect of the section is to prevent Hancock, who had delivered no particulars, from adducing any evidence to shew that the patent was invalid, therefore the relief prayed for may be granted as against him. On grounds of public policy a patentee, who has himself made a solemn declaration of the novelty of his invention, should not afterwards be allowed to allege that it is bad for want of novelty.

At all events, as Hancock made no application to the Court below for leave to amend by delivering particulars, though almost invited to do so by the Court, the House will consider that he has caused the present difficulty by his own conduct, when it comes to deal with the costs.

T. Aston Q.C. was not called on to reply.

EARL OF SELBORNE L.C. :—

My Lords, this case comes before your Lordships in a very peculiar position. The Court of Appeal has, on grounds which I must take to be valid because there is no appeal against them, declared by the decree under appeal that the patent of the plaintiffs in the action is void and invalid ; and by the same decree the Court has ordered one of the defendants, Mr. Hancock, to be dealt with by way of injunction and otherwise as if the patent had been valid. I suppose that there is no precedent or example to be found of a similar decree—indeed that was virtually admitted at the bar by the learned counsel for the respondents, who has, I think, done full justice to his case, though under the disadvantage of the absence of his able leader Mr. Davey. Of course there may be reasons and circumstances which may possibly justify such an order, which on the face of it appears to be inconsistent with itself and to involve very remarkable and extraordinary, and I must say, at first sight at all events, unreasonable consequences. The only ground on which that difference in the way of dealing with the two parties is placed by the order itself, and which appears upon the face of the order, is this, that "the defendant James Robinson Hancock not having given any particulars of objection to the validity of the letters patent"—then the order is made, which in terms is applied to him, though I think, for reasons which I shall afterwards give, it practically affects the other defendant also.

The result therefore is this ; the Court below has held that, if there are joint defendants sued together for a joint infringement, by their common acts, of a patent, unless each of them and both of them deliver the particulars required by the statute, the Court may consistently and properly declare the patent absolutely void and null as against one of them, and treat it in effect as if it were valid against the other, by one and the same decree. If the statute had made that necessary, the statute of course must be obeyed ; but it would be a singular result that, whilst as to one of the defendants and all the rest of the world the invalidity of the patent is established, one particular defendant is dealt with as if it had been good during the whole of its so-called duration, that is to say, what would have been its duration if it had been

H. L. (E.) 1885 SMITH v. CROPPER. Earl of Selborne, L.C.

valid, and is separated from his co-defendant and the rest of the world, and made singly and solely the person who cannot carry on this business or use this manufacture, on the ground of his having failed to comply with the requisites of the statute which would entitle him to the benefit of the defence.

Before we admit such consequences, it is necessary to examine carefully, first, the provisions of the statute; secondly, the facts of the particular case as bearing upon those provisions; and thirdly, the consequences of the decree which has been made.

The provision of the statute is only this:—"In any action" (which I take clearly to apply now to any action in the High Court of Justice in England) "for the infringement of letters patent" (I omit what relates to the plaintiff) "the defendant on pleading thereto shall deliver with his pleas particulars of any objections on which he means to rely at the trial in support of the pleas in the said action; and at the trial of such action no evidence shall be allowed to be given in support of any alleged infringement, or of any objection impeaching the validity of such letters patent, which shall not be contained in the particulars delivered as aforesaid: Provided always that the place or places at or in which and in what manner the invention is alleged to have been used or published prior to the date of the letters patent shall be stated in such particulars." And then there is a provision for amendment of the particulars.

No express notice is taken, on the face of that section, of the possible case of there being more defendants than one. It does not say in terms that if there are more defendants than one every defendant shall, unless they all join in their defence, deliver separate particulars, whatever may be the circumstances of the case, or their relations to each other. It does not say that they shall or shall not do so. And I apprehend that, in determining the question whether in a particular action the statute has been in substance complied with or not, we must look to the nature of the case, to the position and relations of the parties, and to the case made against them by the plaintiffs. If it so happened (I will put aside the question under what circumstances it could happen) that the defendants were persons whose cases were wholly distinct, who had nothing to do with each other, whose acts were

acts for which each of them was severally and solely responsible, and in which the others of them had no interest, if that case arose, it might be that a Court of justice, applying this section of the statute, might properly hold that one defendant who had not given full particulars should have no benefit from what had been done by another defendant, with whom he had no connection or concern, and whose case was entirely separate from his own. What the consequences of that might be it is not necessary at present to say. But where there is a case, as I said, not expressly noticed or provided for in terms by the section, of co-defendants who are sued as being jointly liable for their joint and common acts, whose cases on the face of the plaintiffs' pleadings and their own are not separate as to the substance, though they may sever in the conduct of their defences, then as to that case, if the substance of the statute and its substantial objects are complied with, I see no words in it which say that justice is not to be done in the case because one of the defendants has neglected or omitted or refused in point of form to put in the particulars which have been put in by the other, who is in pari casu. The substance of the statute, its substantial objects, are plainly answered; because the object is that the plaintiff may know what case he has to meet, that he may not be taken by surprise, that he may be informed, if it be a question of novelty, of the place or places at which, and the manner in which, the invention is alleged to have been used or published before the date of the letters patent; and if he has that information from one of two parties who stand together in pari casu, so far as substance is concerned, everything intended and aimed at by the statute has been done; and there can be no reason for saying that evidence which must be allowed to be given in support of the objection so far as relates to the person who has put in the particulars, being so received in a case which is substantially common to both, is not to be attended to as applying to the whole case.

That is my view of the statute. If two parties are sued as partners for infringement as partners in their partnership business, as to whom no separate case is made, or sought to be made, by the plaintiffs, and if one of those partners has put in the necessary particulars, it is obviously for the defence of the case

H. L. (E.) 1885 SMITH v. CROPPER. Earl of Selborne, L.C.

in which he is interested, but which is necessarily common to him and the other; and I am not prepared to hold that the fault or the neglect of the other partner to put in similar particulars, though he does not defend jointly, ought to result in separate judgments against the two. That fault or neglect might, as was suggested by your Lordships during the argument, arise in various ways. It might be in the first instance, because one of the partners might be at variance with his co-partner and not willing to help him in his defence, willing even to throw obstacles in his way. It might be because he was a mere trustee, with no real beneficial interest at all, and at the same time not choosing to entrust the conduct of his defence to his cestui que trust, as he might be liable in point of law for infringement. Other cases might be put, such as absence abroad, or possibly incompetence through imbecility of mind, and at the same time want of sufficient authority to defend together. In those cases, when the particulars have been given by a defendant who had a right to give them, and when, as I have said, the plaintiffs' case throughout is not a separate case against each of the defendants but a common case against them both, it would be strange indeed if the statute had required a Court of law declaring the patent to be invalid upon evidence properly received on behalf of the person who put in the particulars, at the same time to treat it as valid as against the other in pari casu. I do not think that there is anything in the words of the statute which really requires so unreasonable a conclusion to be arrived at.

The facts are simply these. The defence was originally a joint defence, and by a joint pleading all the ordinary objections, want of novelty amongst the rest, were expressly taken by both of the defendants, they being partners and, as I have said, being sued as such. I entirely agree that the statute would not be satisfied by a general plea of want of novelty, without particulars of place and time and so on, shewing in what manner it is intended to make out that general allegation. But, as I have said, if that particular is supplied in substance by one of the partners, I think it would be a strange thing if the other partner were to be held liable to such an order as this, because he has not also put in a similar particular, and because, for some collateral reason, he

has thought it convenient to sever in his defence. What would be the effect in this case? The only effect of doing the thing which was not done would have been to double the costs of the particular—nothing else. It would have been the same particular repeated, in the name of another person, and for no reason involving a difference in their cases except this, that there was some other motive which led them to be unwilling to conduct that part of their defence jointly. We know from what we have heard what probably was the motive for severance, that there was some apprehension, not a well founded or a reasonable one, of a question of estoppel being raised against one of these defendants, which could not be raised against the other. Ex abundanti cautelâ, as was thought, (but I confess I think with precisely the opposite effect from that of caution), an application was made to the judge to treat them as defending separately; and, this being allowed, one of the two partners, Mr. Smith, who believed himself to be free from the influence of any such possible objection, took upon himself the specification of the necessary particulars of their common defence; because that is what he did. The particulars of objections run thus: "Take notice that at the trial of this action the defendants" (that is both of them) "will deny that they have infringed the letters patent in the statement of claim, and the defendant Smith will rely on their objections" (that is the objections of both of them) "to the validity of the said letters patent," and so on. I consider in point of construction that everything which follows is governed by those words of introduction. What is the fair meaning of that? That one of the parties, who supposes himself to be clear of certain objections which may possibly be made by way of personal exception against the other, takes upon himself to maintain the objections which both of them have made, and which both of them still make on their common pleading, and to supply the specification of particulars which the statute requires. In those circumstances, and that being the relation of the parties, I cannot agree with the Court of Appeal that there was any substantial want of compliance with the requisites of the statute. The necessary notice is given—the plaintiffs know what they have to meet; and even (though I do not rely much upon that) in a subsequent proceeding where

H. L. (E.) 1885 SMITH v. CROPPER. Earl of Selborne, L.C.

further particulars were asked for, the plaintiffs asked for them as against both the defendants, plainly understanding this as applicable to that which from the nature of the case was necessarily their common defence.

So much for the particulars. The objection is of the most formal and technical kind possible, and I find nothing in the statute which, as applied to such a case and to such a state of circumstances, gives it any force, weight, or validity.

But when we come to the order which has been made, the evidence having been received and not rejected, no distinction having been drawn with respect to the party against whom it was received,—when we come to the final order of the Court of Appeal we find not only that Mr. Hancock, because he did not put in a separate particular and double the cost, whatever it might be, of that proceeding, is saddled with damages and costs, but also that because he gave no particulars he, his servants, agents, and workmen are restrained till the end of the time for which the patent would have endured if it had been valid, although it is declared to be invalid and void, from making anything according to the patent.

Mr. Hancock is the partner of Mr. Smith, and although in form the injunction is against Hancock, it is in substance an injunction against the partnership as long as it continues, that is against Smith as well as Hancock. It is in substance an injunction to stop the partnership, while it continues, from doing that which Smith is declared to be at liberty to do. No doubt it may be said that the partnership might be dissolved. Is it of no importance to Smith, who has pleaded his defence correctly, that he should be forced to dissolve the partnership, or be treated as bound by Hancock's omission to deliver particulars, and in that way as if the patent, which in his favour was declared to be void, had been declared to be good?

The order goes on to direct that Hancock, within fourteen days after service of it, is to "deliver up to the plaintiffs or destroy all bobbin, net, or twist lace machines, or parts of such machines in his possession or power, made by him in manner described in the specification." Upon the pleadings, and upon the evidence and the admitted facts of the case, that means machines made by

the partnership—by Smith and Hancock. Though in form an order against Hancock, it is in substance quite as much an order against Smith, the successful defendant in the case; and so is the next direction, namely, an order that upon reasonable notice "the plaintiffs, their servants and agents, be at liberty to enter upon the premises of the defendant Hancock," which means the premises of Smith and Hancock.

I confess that I think this order is felo de se, that it is inconsistent with itself, that it deprives Smith of the benefit of his defence to a very great extent indeed, perhaps affecting the whole of his business, it may be the whole of his prosperity in life, on the ground of Hancock not having given in a duplicate of his particulars. I find in the statute no sufficient ground for anything of the kind. I am therefore of opinion that, on the facts and the substance of the case, this order ought to be reversed. If it had depended upon the question of giving liberty to amend at this stage, I own, although I have very great respect for Bowen L.J., and think that there is very excellent sense in the general tenor of his observations on that subject, yet, under the peculiar circumstances of this case, if I had thought that the order was right without amendment, I doubt whether I should have advised your Lordships to reverse it for the purpose of allowing an amendment to be made.

Upon the point of estoppel, I really do not think it necessary to say anything. The Court below was unanimous upon it, and it appears to me to be clear that there was no estoppel in this case.

[His Lordship then proposed the order which the House made, and which is set out at the end of this report, and continued as follows:—]

With regard to the costs of this appeal, it does seem to me that by the extraordinary way in which they have managed their defence and contrived to put themselves in point of form into an embarrassing and improper position before the Court, the defendants (the appellants) have practically brought this evil upon themselves. While, therefore, I do not think that in the court below they should have been ordered to pay costs, I should advise your Lordships to give no costs of this appeal.

H. L. (E.) 1885 SMITH v. CROPPER.

LORD WATSON:—

My Lords, I also am of opinion that in the circumstances of this case there has been a substantial compliance, on the part of both the appellants, with the provisions of sect. 41 of the Patent Act of 1852. But it is unnecessary for me to explain the reasons which have led me to form that conclusion, for these have been already fully and clearly stated in the opinion delivered by the Lord Chancellor. I concur in the judgment proposed.

LORD FITZGERALD:—

My Lords, I also concur in thinking the order of the Court below a most extraordinary order, carrying with it such astounding consequences that one is almost justified upon the face of it in saying that it was obvious to any one reading that order that it could not stand according to English law. It first declares that the patent which is the foundation of the action (it being an action for infringement of a patent and founded on the patent itself) is absolutely void and gone; and then it proceeds to deal as against one of the defendants, and to give relief, upon the supposition that the patent, which in the previous sentence it declared to be void, was operative in law and entitled the plaintiffs as against that other defendant to the very complicated relief which is given. Now it is to be observed here that this was an action against the defendants jointly as partners, and in respect of joint acts alleged to be acts of infringement of this patent. The defendants do in their defence formally make the defence, and there is an issue joined upon it in reference to both defendants, that the patent was void because in some of its material parts it was not novel. There is that issue formally joined on the record, and it is observable that possibly what led to the whole of this case is the replication on the part of the plaintiffs to that defence in which they formally put forward, just as if it had been an old defence at law and an issue taken upon it, that "under the circumstances set forth in the statement of claim the defendants are estopped from disputing or denying the validity of the patent;" and then they do not stop there but they go on "and the plaintiffs join issue with the defendants upon their statement of defence," one of the allegations being that that patent was void for want of novelty.

Then the defendants took the very eccentric course of making a special motion for liberty to be taken as defending separately; and from that moment commenced, what I call, upon these orders, a scene of confusion. The order itself declaring that they should be treated as having severed in their defence, is what creates all the confusion in the case. In the schedule to that order the form of the objection to be taken in the event of the plaintiffs not exercising the option which is given to them of discontinuing the action and commencing a fresh one if they thought fit, is there put forward as an objection on the part of the "defendants," and so it is also in the very language which is subsequently used when in the following September notice of objection is given. Then we have this further, which ought not to embarrass the plaintiffs save to this extent, as interpreting what had gone before, namely their summons for further particulars. In their summons for further particulars they interpret the previous notice given under the order of Pearson J. as a notice given on behalf of both defendants, and the objections taken are specified as objections on the part of both defendants. It is obvious that no injustice whatever would be done by treating both the defendants in the same way, and the only thing to inquire is whether in any way the technical objection arising on the statute of 1852 is disposed of. I think the reasoning of the noble and learned Earl on the woolsack is perfectly satisfactory on that subject. There was full information to the plaintiffs of the case that was to be made, and no difficulty or hardship was inflicted upon them with reference to that.

The Court of Appeal determined, and I assume determined properly, that the patent of 1873 was void. We have no appeal before us on that subject and we take that to be correct and conclusive; but what ought that Court to have done? It was not on the defendants' evidence, given in the proper form, when the defendants came to state their case, but upon facts which were elicited by the defendants, who appeared by the same counsel, in cross-examination for both, that the Court came to the conclusion that the patent was void. Now, let me ask what in common sense, or according to the ordinary practice, was the proper course to pursue? The foundation of the plaintiffs' claim failed, and the

H. L. (E.) 1885 SMITH v. CROPPER. Lord Fitzgerald.

course was immediately to pronounce judgment dismissing the action against both defendants. The peculiar circumstances of the case might have raised questions as to the costs which the defendants would be entitled to of issues which were not disposed of. They might have raised a question of that kind, but whereas, according to the old common law practice, when the plaintiff's case utterly broke down, the course was to put the plaintiff at once to elect either to submit to be nonsuited or to have judgment delivered against him—one or the other,—under the Judicature Act a judgment of nonsuit has the same effect as any other judgment; and the Court therefore should have at once pronounced judgment, dismissing the action of the plaintiffs, because their action had broken down on the point which was in issue, there being an express issue as to the validity of this patent. Everything beyond that was consequential, and I cannot understand why that course was not adopted. I entirely concur in thinking that this order cannot for a moment be permitted to stand, and that it must be dealt with in the way which the noble and learned Earl has intimated.

Order appealed from reversed save so far as it discharged the judgment of Pearson J., and so far as it declared that the letters patent are void on the ground therein stated. The action to stand dismissed with costs; the respondents to pay the costs in the Court of Appeal. The sums of £730 10*s.* *and* £51 10*s.* *paid by the defendants to the plaintiffs by way of damages in pursuance of the judgment of Pearson J. to be repaid by the plaintiffs to the defendants. The sum of* £494 16*s.* 7*d.* *paid for costs under the judgment of Pearson J. to be repaid by the plaintiffs to the defendants. Cause remitted to the Chancery Division.*

Lords' Journals 17th March 1885.

Solicitors for appellants: *Marsland, Hewitt & Everett, for Everall & Son, Nottingham.*

Solicitor for respondents: *Frith Needham, for Cann & Son, Nottingham.*

[HOUSE OF LORDS.]

JOHN GILLANDERS INGLIS . . . . APPELLANT; AND WILLIAM RAVENHILL STOCK . . . . RESPONDENT.

H. L. (E.) 1885 March 30.

Insurance, Marine—Insurable Interest in Goods at Purchaser's Risk—Sale of Goods "f.o.b."

D. sold to B. 200 tons of German sugar "f.o.b. Hamburg; payment by cash in London in exchange for bill of lading;" the price to be variable according to the percentage of saccharine matter which was not to exceed or fall short of certain limits. B. resold to the respondent the same quantity at an increased price, but otherwise upon similar terms. D. also sold to the respondent 200 tons upon similar terms. To fulfil these contracts 390 tons (being ten tons short) were shipped in bags on one vessel at Hamburg for Bristol, no bags being set apart for one contract more than the other. Each bag was marked with its percentage of saccharine matter, and bills of lading with marks corresponding to the bags were sent to D. to be retained till payment in accordance with the contracts. The respondent was insured in floating policies upon "any kind of goods and merchandises" between Hamburg and Bristol, and duly declared in respect of this cargo. The ship sailed from Hamburg for Bristol and was lost. After receiving news of the loss D. allocated 2000 bags or 200 tons to B.'s contract, and 1900 bags or 190 tons to the other contract. In an action upon the policies:—

Held, affirming the decision of the Court of Appeal, that the sales being "f. o. b. Hamburg" the sugar was at the respondent's risk after shipment; that he had an insurable interest in it; and that the underwriters were liable.

APPEAL from an order of the Court of Appeal (Brett M.R. Baggallay and Lindley L.JJ.) (1), reversing a decision of Field J. (2). The facts are stated in the reports of the decisions below, and in the judgment of the Lord Chancellor in this House.

Mar. 26, 27. *Sir F. Herschell* S.G. and *A. Cohen* Q.C. (*J. Gorell Barnes* with them) for the appellant:—

The respondent may have had an insurable interest in loss of of profits on the two contracts, but he had none in the goods

(1) 12 Q. B. D. 564. (2) 9 Q. B. D. 708.

H L. (E.) 1885 INGLIS v. STOCK.

themselves. The decision of the Court of Appeal was based upon a supposed custom or course of business as to the allocation or distribution of the bags for each contract, and upon the respondent's supposed knowledge thereof. But the evidence fails to support such a state of things. The sugar might have been appropriated at the time of shipment. As it was not, no property had passed to the respondent at the time of the loss, and the sugar was then at the risk, not of the respondent, but of the vendors. The property was still in the vendors, subject, perhaps, to a special property in the German bankers who had advanced payment. Unless before the loss there is such an appropriation as to enable the purchaser to claim a particular part of the cargo as his there is no insurable interest: *Anderson* v. *Morice* (1); *Seagrave* v. *Union Marine Insurance Co.* (2); *Ebsworth* v. *Alliance Marine Insurance Co.* (3). No property can pass in goods till separation from bulk: Blackburn on Sales p. 122; Benjamin on Sales chap. 5. There was no appropriation here till after the loss; and no appropriation at all with the purchaser's consent. That being so, the purchaser was not bound to accept the appropriation or pay for the sugar. The vendor could appropriate as he pleased, provided he fulfilled the contract, and the price depended upon the mode of appropriation. No appropriation after the loss would suffice unless the purchaser had the right of selection, which was not the case here. There was no evidence of any express or implied authority to appropriate after the loss. The purchaser's interest (such as it was) being not an interest in specific goods was not insurable.

C. Russell Q.C. *R. T. Reid* Q.C. and *Danckwerts* for the respondent, were not heard.

March 30. EARL OF SELBORNE L.C.:—

My Lords, the question in this case is whether the plaintiff had, at the time of the loss of the steamer *City of Dublin* in the River Elbe, on the 4th of February 1881, an insurable interest in 3900 bags (or 390 tons weight) of sugar, part of that vessel's

(1) Law Rep. 10 C. P. 609, 616; 1 App. Cas. 713.
(2) Law Rep. 1 C. P. 305, 320.
(3) Law Rep. 8 C. P. 596.

cargo? The Court of Appeal, reversing a judgment of Field J., decided in the plaintiff's favour.

By two contracts dated respectively the 7th and 12th of January 1881, which were (except as to dates and parties) identical in their terms, Messrs. Drake & Co. merchants of London, agreed to sell to one Beloe and to the plaintiff respectively, 200 tons each of German beetroot sugar to be shipped from Hamburg. The material terms of the contract between Drake and Beloe are these:—"London, 7th January 1881, Messrs. W. Beloe & Co. We have this day sold to you for your account 200 tons German beet sugar of the crop 1880–81, at 21*s.*/9*d.* per cwt. of 50¾ kilos. net f.o.b. Hamburg for 88 degrees net saccharine contents." I need not read all the details. "The sugar shall analyse between 85/92 nett both inclusive; sixpence per cwt. to be paid or allowed for each degree above or below 88, fractions in proportion; but anything above 92 not to be paid for. Should the average analysis of whole contract exceed 90, such excess is not to be paid for. The analysis is to be effected by a public German chemist." Then, omitting some immaterial points, it goes on: "For January delivery at Hamburg. Payment by cash in London in exchange for bill of lading less two months' interest at 5 per cent. per annum. Any dispute arising out of this contract to be settled by arbitration of two London brokers in the usual way."

By another contract, dated the 7th of January, the plaintiff bought from Beloe the sugar which Beloe had contracted to buy from Drake & Co., upon substantially the same terms, except that the price to be paid for it to Beloe was to be 21*s.*/10½*d.* per cwt., subject to like variations between the same limits; and that the average analysis of the whole contract was "not to exceed 90." The price, therefore, in each case was to be variable, according to the percentage of saccharine matter in the sugar; the goods were, in each case, to be delivered at Hamburg free on board, and (consequently) were, after shipment, to be at the purchaser's risk; and the bills of lading were to be retained by the vendors till the purchase-moneys were paid.

The plaintiff and Beloe at Bristol and the agents of Drake & Co. at Hamburg engaged space for these sugars in a general

H. L. (E.) 1885 INGLIS v. STOCK. Earl of Selborne, L.C.

ship, the *City of Dublin*, one of a line of steamers trading between Bristol and Hamburg. The shipping agents at Bristol, being informed by the plaintiff of his two purchases from Beloe and Drake & Co., and learning from Beloe that Drake & Co. were his vendors, advised their correspondents at Hamburg that 400 tons of sugar would be coming for that ship's cargo from Drake. I do not think it material, but it is proper to notice that the plaintiff did not know from whom Beloe had bought, and Drake & Co. did not know that Beloe had sold to the plaintiff, till after the loss.

The quantity actually put on board the *City of Dublin* at Hamburg was only 3900 bags, or 390 tons. As to this, I think it enough to say, that if the plaintiff would have had an insurable interest in 4000 bags, under the circumstances of the case, he had, in my opinion, such an interest though the quantity was short by ten tons.

No other sugar belonging to Drake & Co. was put on board this ship. The 3900 bags were, therefore, specifically separated from the bulk of the vendor's own sugar; and they were shipped under Drake & Co.'s contracts with Beloe and the plaintiff, with a view to and in fulfilment of the agreement of Drake & Co., as vendors, to put the purchased sugars "free on board." The present controversy arises out of the manner in which this was done. Each bag was distinguished by a mark denoting its percentage (according to certified analysis) of saccharine matter; and ten bills of lading, for parcels bearing marks corresponding with those on the bags, were made out in an impersonal form, and sent (according to the contracts) to Drake & Co., to be retained by them till the time of payment should arrive. The aggregate consignment (except as to the deficiency of 100 bags) was proper and suitable to fulfil the two contracts, without exceeding, as to either of them, the average of 90 per cent. of saccharine matter; and (according to the evidence of Mr. Hales, a partner in the firm of Drake & Co.) it was made up and "ordered forward" as being "so divisible." But no particular bags were then set apart or marked as applicable to the one contract more than the other; it was thought sufficient by Drake & Co., or their agents, to leave this to be done when the bills of lading

came forward. There would be no practical difficulty in doing it in a proper and reasonable way, even if the plaintiff had not purchased Beloe's contract, inasmuch as neither purchaser could claim, and Drake & Co. were not to be paid for, any excess beyond 90 per cent. of the average analysis of the whole contract; though it was conceivably possible that it might have been done perversely and unreasonably. The division was in fact made by Drake & Co., who forwarded invoices of the parcels attributed to each purchaser on the evening of the 4th of February, after they had received notice of the loss. In the division so made the deficiency of ten tons was ascribed to the plaintiff's contract, being the later in date. No question was raised by the plaintiff or by Beloe; and the purchase-moneys were paid by the plaintiff according to the contracts and invoices. But by this, which was done after the loss, the underwriters were (of course) not bound.

It is contended, on the part of the appellant, that, under these circumstances, and for want of a proper division before the loss, the shipment had not the effect of divesting the prior title of Drake & Co., the vendors, or of passing any interest in these sugars to the plaintiff. This argument appears to me to confound two very different things; the appropriation necessary as between vendor and purchaser, and the division, as between purchaser and purchaser, of specific goods, actually appropriated to the aggregate of the two contracts. I do not think it follows that there could be no appropriation by the vendor of which the purchasers might take the benefit, merely because the parcels of goods appropriated were mixed, in the act of appropriation, so as to require some subsequent division or apportionment. Whether this may have happened by previous agreement or course of dealing between all the parties (in which case there could be no serious doubt), or by accident, error, or want of proper care on the vendor's part, appears to me to make no difference in principle. The purchasers might possibly be entitled to reject, but the vendors could not, in my opinion, without their consent retract the appropriation.

In the present case, I see no reason to doubt that the difficulty arising from the confusion of parcels—material only to the settle-

H. L. (E.) 1885 INGLIS v. STOCK. Earl of Selborne, L.C.

ment of the amounts payable by the plaintiff to his two vendors—if not solved by consent (or by arbitration, for which each contract provided) would have been soluble by principles of law, applied to the facts and the terms of the contracts. The necessity for doing this, and the fact that it had not been done at the time of the loss, do not, in my opinion, sufficiently distinguish this case from *Browne* v. *Hare* (1) and earlier authorities to the same effect. The goods were, by the act of the vendors, separated from the bulk of all other goods belonging to them; they were shipped "free on board" in what (for that purpose) was the purchaser's ship, under two contracts so to deliver them; in both which contracts (subject to the payments to be made by him to Drake & Co. and Beloe) the plaintiff was then (although Drake & Co. did not know it) solely interested. I cannot infer from any part of the evidence that, in so shipping them indiscriminately, the vendors intended to break, instead of fulfilling, their contracts, and to take upon themselves (contrary to those contracts) the subsequent risk of loss, and the liability to freight. Yet this (as it seems to me) would be the necessary consequence of the appellant's argument.

I think the order appealed from is right, and I move your Lordships to affirm it, and to dismiss the appeal with costs.

LORD BLACKBURN:—

My Lords I also agree that there is no occasion to hear the counsel for the respondent.

The respondent (plaintiff below) had insured himself by floating policies to the extent of, as I understand, £5000. One of the policies is set out as a sample policy. It is a policy for £4000, part of £5000, and is marked on the margin No. 4247. By it the respondent caused himself to be insured in respect of goods conveyed in a steamer "from the continent of Europe between Havre and Hamburg, both ports included, $\frac{\text{and}}{\text{or}}$ Rouen $\frac{\text{and}}{\text{or}}$ Nantes to Bristol upon any kind of goods and merchandises," "beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship at as above upon the said ship &c., including all risks of craft, and so shall continue

(1) 3 H. & N. 484; 4 H. & N. 822.

and endure during her abode there upon the said ship &c. And further until the said ship with all her ordnance, tackle, apparel &c., and goods and merchandises whatsoever, shall be arrived at as above upon the said ship &c., until she hath moored at anchor twenty-four hours in good safety and upon the goods and merchandises until the same be there discharged and safely landed." Then I pass over a sentence which is immaterial for the present purpose. "The said ship &c., goods and merchandises &c., for so much as concerns the assured by agreement between the assured and assurers in this policy are and shall be valued at £4000, part of £5000, on sugar to be hereafter valued and declared. To follow policy for £4000 No. $\frac{3}{4246}$ dated 6th of December 1880." The meaning of to be "hereafter valued and declared" is, that if the insured has several adventures, all within the description in the policy, out, he may select at his pleasure which is to be protected by the policy; and, on his giving notice of such a selection to the insurers, the policy is as if it had named that adventure from the beginning. Of course, if adventures have been previously named, these come first, and whether those prior subjects of insurance are lost or not, the policy is equally pro tanto functus officio. And I believe the practice is if there is nothing to shew that the first adventure which came in safe was selected not to be under the policy, it is taken to be so, though there is no declaration.

The meaning of "To follow policy for £4000 No. $\frac{3}{4246}$" is, that there being consecutive policies any loss declared is to be borne first by the earlier policies, and that it is not till after the policy No. $\frac{3}{4246}$ is exhausted, either by losses or declared adventures which have come in safe, that the underwriters on the policy which follows are to bear the balance of the loss if any. There is not, as far as I remember, any other difference between a policy in the present form with a declaration that it is on sugar valued at £3800 loaded in the *City of Dublin* steamer sailed from Hamburg to Bristol on the 3rd of February 1881, and an ordinary policy for the same sugar valued at the same sum on the same steamer on the same voyage.

The defendant below is an underwriter for £150 on each of these consecutive floating policies.

H. L. (E.)
1885
INGLIS
v.
STOCK.
Lord Blackburn.

There is no dispute, at least now, that the *City of Dublin* is such a steamer, and the voyage such a voyage as was within the terms of the policies, nor that the values and declarations were properly given, nor that there was enough left unexhausted on the policies to enable the underwriters to pay a total loss. But it was said that the situation of the plaintiff with regard to the sugars was not such as to give him an insurable interest. And I have no doubt that in order to recover against an underwriter the assured must shew that he suffers loss in respect of the thing insured. In case of an insurance on goods if he shews that he had at the time of the loss the whole legal property in the goods which were lost, he undoubtedly does shew it. But I do not agree that this is the only way in which he can shew an insurable interest in goods, or that any relation to goods such that if the goods perish on the voyage the person will lose the whole, and if they arrive safe will have all or part of the goods, will not give an interest which may be aptly described as goods.

In the present case there has been a good deal of extraneous matter brought into the discussion. I think if it had been remembered that the three contracts, viz. that of the 7th of January, between Drake and Beloe, that of the same date between Beloe and the plaintiff, and the contract of the 12th of January between Drake and the plaintiff, were all in writing; and it had been seen that they are so expressed that, as in my opinion, there is no doubt as to their construction, the objection would have been much more clearly raised, not I think for its benefit.

Drake & Co., of London, who were large importers of beet sugar manufactured in Germany, made a contract with Beloe of Bristol, who sometimes, as we find, bought to sell again. There are, I gather from a letter of the 25th of January from Hermann of Hamburg to Drake, trading lines of steamers running twice a month from Hamburg to Liverpool, Leith, and Bristol, and it may be other places; but to London, and it may be other places, if a steamer is wanted from Hamburg it must be chartered, but of course it may be chartered.

And now by the contract Drake & Co. bound themselves to Beloe to supply 200 tons of German beet sugar of the crop of 1880–81. It was not only to be German beet sugar but it was to

analyse between 85 and 92 "but anything above 92 not to be paid for;" so that it would seem that sugar below 85 would not fulfil the description in the contract, but sugar above 92 might be given in fulfilment of the contract, though the excess was not to be paid for. No portion of the sugar now in dispute was either below 85 or above 92 so that this term does not come into operation. The sugar was to be "net free on board Hamburg" and it was for January delivery at Hamburg. The price was to depend on the "average analysis of the whole contract." "Should the average analysis of the whole contract exceed 90 such excess is not to be paid for." The Solicitor-General raised an argument on this clause which I shall notice by-and-bye. The price was to be paid in London in exchange for bill of lading.

Now under this contract the first thing to be done was by Beloe (the buyer). He must let Drake the seller, or rather supplier, know in due time on what ship the goods were to be shipped free on board, for till he knew that Drake could not put the goods on board. Beloe might (as in fact he did), engage to put sugar on board several steamers bound to Bristol, but he might have made an engagement to ship sugar for Leith and wish to have the sugar put on board the Leith steamer. Or he might (though that was less likely) have chartered a steamer for London, or any other port, and wish the sugar to be put on board that. As soon as he had secured room in the steamer he did select, and let Drake & Co. know in good time on what steamer they were to ship them, Drake & Co.'s part of the contract begins; they are bound to have there at Hamburg, and to ship free on board that ship, 200 tons of sugar answering in all respects the description in the contract. Provided the sugar of the proper quantity and description was put on board that ship it was no concern of Beloe's where or how Drake & Co. got it. So soon as they had done that they had fulfilled their part of the contract so far. But the price was to be paid in London in exchange for bill of lading. And no doubt from that it is to be implied that Drake & Co. were to take a bill or bills of lading for the sugar they put on board and, were in due time to be ready and willing to give the bills of lading in London in exchange for the price. If Drake & Co. did this Beloe was bound to pay the price.

H. L. (E.)
1885
INGLIS
v.
STOCK.
Lord Blackburn.

Now Beloe had on the same day, but whether before or after he had made the contract with Drake & Co. does not appear, made a contract with the plaintiff to supply him with 200 tons of sugar at 1½*d.* a cwt. higher price than that at which Drake had agreed to supply Beloe. As the plaintiff knew where he wanted the sugar this was to be shipped "free on board A 1 steamer to Bristol." The description of the sugar was the same as that in the contract between Drake and Beloe except that it was said "average analysis not to exceed 90." The Solicitor-General said that if the average analysis exceeded 90, Beloe was bound to take it from Drake, but not to pay the excess in price; but the plaintiff was not bound to take this more valuable lot at all; but would be in his right if he rejected it. What would have been the case if that point was raised by the facts, we need not inquire, though I have a strong suspicion that a jury would not much favour it.

But on looking at the documents it appears that not only were the averages under 90, but that by no possible shuffling of the 3900 bags actually put on board the *City of Dublin* could 2000 bags have been selected the average of which would exceed 90. The plaintiff did not know, and had no reason to inquire, where Beloe was to get the sugar with which he was to supply him. The plaintiff saw Edward Stock (his nephew as it happens, but that is immaterial), the agent for the Bristol line of steamers, and according to the evidence of both the Stocks, the plaintiff's directions were to secure room for the 200 tons in the steamer, which would leave at the end of the month; and on the 11th of January Edward Stock & Son, the Bristol agents for the steamers, wrote to Nisstle & Günther the following letter:— "There are 200 tons of sugar sold for shipment the second half of this month, but we have not yet ascertained the names of the shippers. There are also further parcels in treaty," and so forth. This, it must be noticed, was before the contract between Drake and the plaintiff on the 12th of January, and how there can be any doubt raised that the plaintiff did his best as far as regards securing room on that steamer to take on board the sugar which Beloe was to ship or cause to be shipped, I am unable to conceive. He had to advise Beloe of this, and it is sworn that he did so, and I see no possible reason for doubting that he did.

The position of things then as between Beloe and the plaintiff was this,—The plaintiff had done his part, and unless Beloe, by himself or Drake, or any one else, put the proper quantity of sugar of the proper description on board the steamer the plaintiff had a cause of action against Beloe. If Beloe did put the proper quantity on board he was entitled to recover the price in exchange for bills of lading, and it was no answer that the goods had perished at sea before the bill of lading was offered. He did send an invoice specifying the marks and numbers of 2000 bags, undoubtedly put on board, which Beloe alleged had been shipped on plaintiff's account.

If these were proper bills of lading for the sugar shipped it is difficult to imagine a clearer case of a loss of sugar. It is said the bills of lading which he offered to give in exchange for the cash were not the bills of lading of goods shipped for him on the *City of Dublin*, and therefore he was not bound to pay in exchange for such bills of lading; instead of being liable to pay Beloe the price he had an action against him for breach of contract in not shipping as he ought to have done. This requires us to notice some more of the evidence.

When on the 12th of January the plaintiff had made his contract with Drake he at once proceeded to Edward Stock & Sons, who on that very day advised Nisstle & Co. that the 200 tons were coming, so that plaintiff had done his part in securing room for that 200 tons, and if Drake & Co. have not shipped them, he has a cause of action against them. They did not ship the whole 200 tons, but only 190 tons—ten tons or 100 bags meant to be shipped having been delayed—for that Drake & Co. sent an invoice and received payment. And as I said about Beloe, if Drake & Co. have offered the plaintiff bills of lading for goods which were not shipped for him he has a cause of action against Drake & Co., and was not bound to pay. But if Drake & Co. have fulfilled their contract and the bills of lading are those referring to the 1900 bags, then the subsequent loss by perils of the sea is no answer. The plaintiff must pay the price, and has lost it, and that is as clear a loss as can well be.

When Drake & Co., or rather their agents at Hamburg, were shipping the sugar and held the mate's notes, it was no doubt

H. L. (E.) 1885 INGLIS v. STOCK. Lord Blackburn.

their business to see that a proper bill of lading for each separate shipment was signed; and if at any time before the bills of lading left Hamburg they had been allocated to each shipment, no objection, not even an idle one, could have been raised. But instead of doing so the whole of the bills were sent in a lump to London that they might be allocated there. This was perfectly bonâ fide. Drake & Co. had no interest in favouring one more than the other, and were to be paid exactly the same price per bag, whether they allocated it to the one or to the other. And if they had done this before the loss, I do not see what damage either Beloe or Stock could have sustained by the allocation being made in London instead of in Hamburg.

Now I have been quite unable to see, even if the plaintiff had sustained some damage, that it could have been damage going to the whole root of the matter, so as to form a defence for the plaintiff against an action by either Drake & Co. or Beloe for not paying for the goods in exchange for the bills of lading; that is, supposing the plaintiff (because prices had greatly fallen, or from any other unworthy motive) had wished to get off.

And if it were so, I think the case would fall entirely within what Lord Hatherley, in *Anderson* v. *Morice* (1), says is the principle of *Sparkes* v. *Marshall* (2). The insurers have no right to call upon the insured to exercise a possible option to be released from their contract. But the loss having happened before the actual allocation, the plaintiff's loss, when it happened, was a loss not of 200 tons, but of 200 tons parcel of 390 tons, so that the loss, though exactly the same, is said not to be the same in description, because it is the loss of an undivided portion of the goods, instead of being the loss of the goods themselves. I am quite unable myself to perceive why that should make the slightest difference. In the merits, certainly it does not. I am quite unable to perceive why an undivided interest in a parcel of goods on board a ship may not be described as an interest in goods just as much as if it were an interest in every portion of the goods. No authority was cited in order to shew that it was not so, and I can see no reason for it. Then, that being so, of course it follows that there is no defence at all, and this is my opinion.

(1) 1 App. Cas. 735. (2) 2 Bing. N. C. 761.

This, however, is not the ground on which the Court of Appeal decided. They thought that there was shewn to be a custom or course of dealing which rendered Drake & Co.'s conduct a literal fulfilment of the contract. I am not satisfied that on the evidence such a custom or course of trade is shewn. I do not say it is not, but I would at least wish to hear the respondent's counsel before deciding on that ground. On the other, as I have already intimated, I have no doubt at all.

LORD WATSON :—

My Lords, I concur in the judgments delivered, and have nothing to add.

LORD FITZGERALD :—

My Lords, I also concur.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 30th March 1885.

Solicitors for appellant: *Waltons Bubb & Walton.*
Solicitors for respondent: *Hollams Son & Coward.*

[PRIVY COUNCIL.]

J. C.*
1885
Feb. 10.

THE RUSSIAN SS. "YOURRI" (MATWIEFF, MASTER) . . . . . } APPELLANT;

AND

THE BRITISH SS. "SPEARMAN" (WHYTOCK, MASTER) . . . . . } RESPONDENT.

ON APPEAL FROM THE SUPREME CONSULAR COURT OF CONSTANTINOPLE.

Collision—Negligence—Rule 34, *c.* 2, *of the Danube Commission Rules.*

Under Rule 34, Chapter II. of the Danube Commission Rules, vessels going down the Danube should keep to the right bank.

Where a vessel going down the Danube, when there was a fog and approaching night, went to the left bank, *held*, that, according to the true construction of the rule, that was neglect of duty; and that such negligence was the cause of a collision which occurred with a vessel coming up, although the absence of lights on the latter vessel might have partly contributed to the accident.

APPEAL from a decision of the Court sitting in Vice-Admiralty (14th of February, 1884) made in an action and cross-action brought on the 20th of December, 1882, and 30th of January, 1883, in respect of a collision which occurred in the river Danube between the two vessels on the 9th of December, 1882. They were heard on the same evidence. The Court found that both the ships were to blame, and ordered that the *Spearman* should pay to the *Yourri* the moiety of the damages sustained by the latter, less the moiety of the damages sustained by the former, each party paying its own costs of the action, cross-action and assessment of damages.

The facts are stated in the judgment of their Lordships.

Sir W. Phillimore, Q.C., and *Stubbs*, for the appellant.

Webster, Q.C., and *Barnes*, for the respondent, were not called upon.

* *Present*:—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

Article 34, Chapter II. of the Danube Commission Rules was referred to.

The judgment of their Lordships was delivered by

LORD BLACKBURN :—

Their Lordships do not think it necessary to call upon the respondent's counsel.

The first important question is, what, upon the evidence, is the correct view of the facts? There is a great deal that is not in dispute at all. The *Yourri* was going down the river Danube, and the *Spearman* was coming up. When the *Yourri* had got near the spot where the collision took place, there was, according to all the evidence, a certain degree of mist which, on the balance of the evidence, seems to have got sufficiently great to prevent seeing across the river. That being the case, there would be an obvious object and reason for the vessel that was coming down the river to steer so near one shore or the other that it could see that shore and guide itself in going down the river. If she were to keep in the middle of the river when the mist was such that she could not see either shore, she would not know where she was going, and she must come nearer either to one side or the other to guide herself. Having that obvious desire, the question would be, did the *Yourri* go to the left side to guide herself, or did she go to the right?

Now, as to that question, the whole of the evidence shews that she went to the left, and, in addition to that, after the collision took place she was found on the left side. What effect the collision might have had in moving the vessel from the spot where the collision took place to one side or the other would not matter here. It might have had some effect in pushing the vessel farther from or nearer to the shore, but it is quite clear that there is not, upon this evidence, any ground for saying that the Court below were wrong in their conclusion that the vessel could not have been pushed to the spot where her hulk was found lying, and brought there by anything that happened after the collision, unless she was upon the left-hand side of the river instead of the right-hand when the collision happened.

J. C.
1885
RUSSIAN SS. "YOURRI" v. BRITISH SS. "SPEARMAN."

That fact being established, then comes the question that is put as a matter of law: Was it a right decision of the Consular Court to hold that it was negligent in the vessel coming down the river, especially when there was a fog and approaching night, to go to the left-hand side instead of going to the right? That of course very much depends upon what is the construction of the rule which has been referred to; that rule seems decidedly to say that in the river the vessel that is going down shall keep to the right bank. This ship, the *Yourri*, did not keep to the right bank when the fog came on, and it was necessary to keep to one bank or the other to guide her; she might and ought to have gone to the right side, and then she would have known that no vessels coming up the river could meet her unless they were neglecting their duty by going to the wrong side. She would then have been safe. As it was, she went, for no reason apparently, on the left-hand side, when she ought not to have done so, and their Lordships think it would be very dangerous indeed in the case of a river navigation to put any other construction on the rules than to say that it is a neglect of duty for the vessel that is to keep to the one side or the other, according as the rules may be, not to do so. It is very necessary that all vessels should know that going down the Danube they should keep to the right bank, and in coming up keep to the left bank, and that it is a neglect of duty and negligence to come across to the other side.

That being so, that this neglect of duty, if it was one, was the cause of the accident, or contributed to the accident, is a matter that can hardly admit of dispute at all. Had the *Yourri* not improperly gone to the left-hand side, the *Spearman* would never have met her. The *Spearman* was held to blame for not having lights, and the Court below thought that the absence of lights partly contributed to the accident, and that decision has not been appealed against.

The result is that the judgment of the Supreme Consular Court must be affirmed, and this appeal dismissed with costs, and their Lordships will humbly advise Her Majesty to that effect.

Solicitors for appellant: *Stokes, Saunders & Stokes.*
Solicitors for respondent: *Thomas Cooper & Co.*

[PRIVY COUNCIL.]

HARRIS . . . . . DEFENDANT;

AND

DAVIES . . . . . PLAINTIFF.

J. C.*
1885
Feb. 12.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Powers of Victorian Legislature—11 *Vict. No.* 13, *s.* 1—*Costs of Action of Slander.*

Held, that the legislature of New South Wales had power to repeal the Statute of James (21 Jac. 1, c. 16), s. 6, and had impliedly done so by 11 Vict. No. 13, s. 1, which, according to its true construction, placed an action for words spoken upon the same footing as regards costs and other matters as an action for written slander.

APPEAL from an order of the Supreme Court (Nov. 19, 1883), making absolute a rule nisi granted on the 22nd of August, 1883.

The main question in dispute was whether the statute 21 Jac. 1, c. 16, s. 6, was in force in New South Wales, so as to debar a successful plaintiff in an action for slander, in whose favour the jury had found a verdict with damages assessed at an amount less than 40*s.* from recovering any further sum for costs, notwithstanding that the judge who tried the action has under the New South Wales District Courts Act (22 Vict. No. 18), s. 101, certified that in his opinion there was sufficient reason for bringing the action in the Supreme Court.

The section 21 Jac. 1, c. 16, s. 6, enacts that in all actions upon the case for slanderous words if the jury upon the trial of the issue in such action, or the jury that shall inquire of the damages, do find or assess the damages under forty shillings, then the plaintiff shall recover only so much costs as the damages so given amount unto.

The action was to recover damages for slanderous expressions

* *Present:*—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

J. C. 1885 HARRIS v. DAVIES.

used by the appellant against the respondent. The verdict was for one farthing. The judge certified for costs. The prothonotary refused to tax and allow them, on the ground that under the section in question the respondent could not recover more costs than damages.

A rule nisi was obtained by the respondent calling on the prothonotary to shew cause why he should not be directed to tax the costs; and was afterwards made absolute. The Court (Martin, C.J., and Innes, J.), in a judgment reported in 4 N. S. Wales L. R. 315, held that the above section, so far as it relates to costs in actions for slander, ceased on the passing of 11 Vict. No. 13 to have any further operation in the Colony.

Lumley Smith, Q.C., and *J. Willes Chitty*, for the appellant, contended that the statute of James I. was in force in the Colony, and applied to the case. The state of English law at the date of passing the Colonial Legislature Act, viz., 9 Geo. 4, c. 83, is shewn by Selwyn's Nisi Prius, 13th ed., pp. 1216 and 391, and 1 Chitty's Archbold, 12th ed., p. 468. Reference was made to 6 Edw. 1, c. 1, 43 Eliz. c. 6, s. 2, 21 Jac. 1, c. 16, s. 6, and to 22 & 23 Car. 2, c. 9, s. 136, both of which, although in part repealed in England by 3 & 4 Vict. c. 24 (Lord Denman's Act), continued to be in force in the Colony. As regards 11 Vict. No. 13, if it intended to repeal the statute of James, it was void and ultra vires. Reference was made to 3 & 4 Vict. c. 62, and 28 & 29 Vict. c. 63. If it did not intend or effect a repeal, the two statutes must be read together so far as it can be done sensibly. The following cases were referred to, *Evans* v. *Rees* (1); *Marshall* v. *Martin* (2); *Garnett* v. *Bradley* (3).

Davey, Q.C., and *Leverson*, for the respondent, contended that 11 Vict. No. 13, was not ultra vires the legislature of the Colony. They relied on the expression "limitations and modifications" in 9 Geo. 4, c. 83, s. 24. The section relied upon in the statute of James was repealed by s. 1 of the Colonial Act.

L. Smith, Q.C., replied.

(1) 9 C. B. (N.S.) 391. (2) Law Rep. 5 Q. B. 239.
(3) 3 App. Cas. 944.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

Their Lordships are of opinion that there are no sufficient grounds for reversing the judgment of the Court below.

Their Lordships are of opinion that the colonial legislature had the power to repeal the statute of James (21 Jac. 1, c. 16, s. 6) if they thought fit, and they are also of opinion that, looking at the 1st section of 11 Vict. No. 13, it was the intention of the legislature to place an action for words spoken upon the same footing as regards costs and other matters as an action for written slander. Under these circumstances, their Lordships think that the statute of James as regards an action for words was impliedly repealed by the Act of the colonial legislature, 11 Vict. No. 13.

Their Lordships will therefore humbly advise Her Majesty that the judgment of the Supreme Court be upheld, and that this appeal be dismissed with costs.

Solicitors for appellant: *Kingsford, Dorman, & Co.*
Solicitors for respondent: *Want & Harrison.*

[PRIVY COUNCIL.]

J. C.* 1885 *Feb.* 12, 13.

POWELL . . . . . DEFENDANT;

AND

APOLLO CANDLE COMPANY, LIMITED . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Powers of its Legislature—Customs Regulation Act of 1879, *s.* 133—*Duties levied under an Order in Council.*

A Colonial Legislature is not a delegate of the Imperial Legislature. It is restricted in the area of its powers, but within that area it is unrestricted.

Held, that the Customs Regulation Act of 1879, s. 133, was within the plenary powers of legislation conferred upon the New South Wales Legislature by the Constitution Act (scheduled to 18 & 19 Vict. c. 54), ss. 1 and 45.

Held, further, that duties levied by an Order in Council issued under sect. 133, are really levied by authority of the Legislature and not of the Executive. Also that under sect. 133 "the opinion of the collector," whether right or wrong, authorizes the action of the Governor.

APPEAL from an order of the Supreme Court (Feb. 21, 1884), directing judgment to be entered for the respondent on his demurrer to the appellant's first plea, and also on the appellant's demurrer to the respondent's third replication.

The action was brought to recover back from the appellant as collector of customs for the Colony the sum of £92 1*s.* 6*d.*, which the appellant had demanded as duty leviable by law on fifteen casks of stearine imported by the respondent, which sum the respondent thereupon deposited in the hands of the appellant as collector.

The appellant pleaded: First, a justification under the 133rd section of the New South Wales Customs Regulation Act, 1879 (42 Vict. No. 19), on the ground that stearine was an article of merchandise then unknown to the collector, that that article, in the opinion of the collector, was apparently a substitute for a known dutiable article, that is to say, candles, that it was

* *Present:*—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

apparently designed to evade duty, and possessed properties in fact which could be used and were intended to be applied for a similar purpose as candles; and that thereupon the Governor with the advice of the Executive Council had directed that a duty of one penny per pound weight should thenceforth be levied on stearine on its importation into the Colony.

The respondent replied: First, joining issue on the plea, and thirdly, that stearine did not in fact possess properties in whole or in part which could be used, or were intended to be applied, for a similar purpose as candles. The respondent also demurred to the plea.

The appellant demurred to the third replication.

The main question on this appeal, was whether the Customs Regulation Act, 1879 (42 Vict. No. 19), s. 133, was invalid, on the ground that the Colonial Legislature in passing that section had exceeded the powers conferred upon it by the 45th section of the bill passed by the Legislative Council of New South Wales, and scheduled as amended to 18 & 19 Vict. c. 54, intituled "An Act to enable Her Majesty to assent to a bill as amended of the Legislature of New South Wales, to confer a constitution on New South Wales, and to grant a civil list to Her Majesty." The bill so amended is known in New South Wales as the Constitution Act.

The respondent contended, and the Supreme Court (Martin, C.J., Windeyer and Innes, JJ.) decided, that the 133rd section of the Customs Regulation Act, 1879, was invalid, on the ground above mentioned.

The case is reported in 4 N. S. Wales L. R. p. 167. The material portion of the judgment of the Chief Justice was as follows:—

Referring to sects. 1, 44 and 45 of the Constitution Act, he said: "These are the powers which the Imperial Parliament has granted to the Legislature of this Colony, very comprehensive powers to make laws for the good government of the Colony in all cases whatsoever, and special powers to impose duties. Now this Legislature possesses only delegated powers, it is not like the Imperial Parliament which acknowledges no superior authority. There is no Legislature within the wide bounds of the British

J. C. 1885 POWELL v. APOLLO CANDLE COMPANY.

Empire which is not in subordination to, and under the control of, that Imperial Parliament, and which does not derive its jurisdiction from that source. I am not speaking of Crown Colonies to which other considerations apply. It follows that every such subordinate Legislature, of which ours is one, in the exercise of its power to make laws is limited by the authority which created it. That authority, when creating this Legislature, gave it the power to make these general laws, and also to impose these taxes, but it did not authorize it to delegate that power to any other body.

"What is it that sect. 133 of the Customs Act professes to do? It is in these terms, omitting immaterial parts:—'Whenever any article possesses, in the opinion of the collector, properties in the whole or in part which can be used for a similar purpose as a dutiable article, the Governor is authorized to levy a duty upon such article at a rate to be fixed in proportion to the degree in which such unknown article approximates in its qualities or uses to such dutiable article.' The Governor having been told by the collector that some article unknown to him possesses properties 'which can be used or were intended to be applied for a similar purpose as a dutiable article' is empowered to direct a duty to be levied on that article. He is to ascertain how far this unknown article in its qualities or uses approximates to such dutiable article. Having ascertained the degree of approximation he then is to fix the duty in proportion thereto. Now it is easily ascertainable whether a commodity is unknown to the collector; but what is meant by 'the degree in which such unknown article approximates in its qualities to such dutiable article?' There is an amount of vagueness and obscurity here which it is impossible to clear up, and yet this is the criterion by which the Governor is to fix the duty on this unknown commodity. It is conceivable that a pound of it might possess properties which could be used in the making of ten pounds of candles, or one pound of it might make only half a pound of candles, and so the duty fixed by the Governor may be more or less than the rate of duty imposed by the Legislature upon candles. But whatever it may be, on being published in a Treasury order, in the *Gazette* and one other newspaper in Sydney,

and exhibited in the long room in the Custom House, it may be demanded on the importation of the unknown article so practically legislated for by the collector and the Governor. Now that appears to me plainly to give the Governor and the collector power to impose duties on articles which the Legislature never had in its contemplation. When the collector says that any article is unknown to him, and that some of its properties can be used in the production of a dutiable article, such as candles, and the Governor in Council ascertains how much it would be necessary to use in the making of a pound of candles, he then fixes the amount of duty to be paid on it; having ascertained this, the new article is thereupon saddled with a duty. That is neither more or less than the Legislature delegating the power to impose taxes. The Imperial Parliament may so delegate, but it has not given the same power to our Legislature. To make this legislation legal there should have been express power given by the Imperial Parliament, not only to impose taxes on the people of this Colony but also to confer on others the power to levy duties. It appears to me, without going into the other points, that under these circumstances the imposition of the duty on stearine was erroneous, and on that ground the demurrer should be sustained."

Davey, Q.C., and *J. D. Wood* (*Rigby*, Q.C., with them), contended that this decision was wrong. The Legislature of New South Wales had plenary powers of legislation within the prescribed limits of its jurisdiction. It had by the 1st section full power to impose and levy customs duties, except in so far as that power was limited by the 44th and 45th sections, which were not enabling but restrictive. There was nothing, however, in those sections which restrained the Colonial Legislature from imposing and levying duties as provided by sect. 133 of the Customs Regulation Act, 1879. And a duty levied by direction of the Governor in manner provided by the section is in reality a duty levied by the Legislature within the meaning of sect. 45. The Legislature of the Colony does not act as a delegate of Parliament. It has plenary powers so far as they go, and it entrusts the Governor with certain discretion, which it can revoke at any moment, not with any legislative power. Reference was made

J. C. 1885

POWELL v. APOLLO CANDLE COMPANY.

to *Reg.* v. *Burah* (1); *Hodge* v. *The Queen* (2); *Russell* v. *The Queen* (3).

Cohen, Q.C., and *Kemp*, Q.C., contended that the judgment was right. By the true construction of the Constitution Act the Legislature of New South Wales had no power to delegate its authority to impose and levy duties to the Governor in Council, and therefore sect. 133 relied upon is invalid and inoperative. The duty in this case was in substance a duty prescribed by the Governor in Council and not by the Legislature. The Customs Act did not authorize a duty upon raw material such as stearine, at the same rate or to the same extent as on candles.

Davey, Q.C., replied.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

The main question in this case is, whether sect. 133 of the Customs Regulation Act of 1879 of the Colony is, or is not, ultra vires of the Colonial Legislature. The section is in these terms:—"Whenever any article of merchandise then unknown to the collector is imported, which, in the opinion of the collector or the commissioners, is apparently a substitute for any known dutiable article, or is apparently designed to evade duty, but possesses properties in the whole or in part which can be used or were intended to be applied for a similar purpose as such dutiable article, it shall be lawful for the Governor to direct that a duty be levied on such article at a rate to be fixed in proportion to the degree in which such unknown article approximates in its qualities or uses to such dutiable article; and such rate thus fixed shall be published in a Treasury order in the *Gazette*, and one other newspaper published in Sydney, and exhibited in the long room or other public place in the Custom House, and a copy of all such Treasury orders shall, without unnecessary delay, be laid before both Houses of Parliament."

The manner in which this question came before the Courts is

(1) 3 App. Cas. 889. (2) 9 App. Cas. 117.
(3) 7 App. Cas. 829.

this :—In pursuance of this section an Order in Council was issued imposing a duty on the importation of stearine, the order following the words of the Act; whereupon the collector of customs insisted on a certain duty of a penny per pound, amounting to £92 1*s.* 9*d.*, being paid on the importation of some 1500 barrels of stearine. The plaintiffs paid that sum under protest, and, in pursuance of sect. 20 of the same Act, brought an action for the purpose of recovering it. The collector defended himself by a plea to this effect:—He recites that stearine is an article of merchandise, using the descriptive words in the Act which have been read; and goes on to say that "thereupon the Governor, with the advice of the Executive Council, duly and in accordance with the provisions of the said Act directed that a duty of one penny per pound weight should thenceforth be levied on stearine;" and "the said rate so fixed was duly published in a Treasury order," and so on. There was a demurrer to this plea, on the ground that the 133rd section of the Customs Consolidation Act, was beyond the competence of the Legislature to enact. This demurrer raises the main question. There is a subsidiary question on the pleadings which will be referred to hereafter.

The powers of the Colonial Legislature depend upon a Colonial Act known as "the Constitution Act," to which Her Majesty assented by virtue of powers given to her by an Imperial statute, the 18 & 19 Vict. c. 54, to which the Colonial Act was a schedule. It may be as well to observe that the 4th section of the Imperial Act is in these terms:—"It shall be lawful for the Legislature of New South Wales to make laws altering or repealing all or any of the provisions of the said reserved bill in the same manner as any other laws for the good government of the said Colony, subject, however, to the conditions imposed by the said reserved bill on the alteration of the provisions thereof in certain particulars until and unless the said conditions shall be repealed or altered by the authority of the said Legislature,"—a somewhat wide power.

The material sections in this Constitution Act are the following:—Sect. 1. "There shall be, in place of the Legislative Council now subsisting, one Legislative Council and one Legislative Assembly, to be severally constituted and composed in the

J. C. 1885 POWELL v. APOLLO CANDLE COMPANY.

manner hereinafter prescribed; and within the said Colony of New South Wales Her Majesty shall have power, by and with the advice and consent of the said Council and Assembly, to make laws for the peace, welfare, and good government of the said Colony in all cases whatsoever." There follows a proviso, "that all bills for appropriating any part of the public revenue, or for imposing any new rate, tax, or impost, subject always to the limitation contained in clause 62 of this Act," which clause is not to be found, and may be disregarded, "shall originate in the Legislative Assembly of the said Colony." Sect. 44 prohibits the Legislature of the Colony from levying duty upon articles imported bonâ fide for the supply of Her Majesty's land forces, or enforcing any duties or charges upon shipping at variance with any treaty of Her Majesty. Sect. 45 is in these terms: "Subject to the provisions of this Act, and notwithstanding any Act or Acts of the Imperial Parliament now in force to the contrary, it shall be lawful for the Legislature of the Colony to impose and levy such duties of customs as to them may seem fit, on the importation into the Colony of any goods, wares, and merchandise whatsoever, whether the produce of or exported from the United Kingdom, or any of the colonies or dependencies of the United Kingdom." And there follows a prohibition to impose differential duties.

It was held by the Supreme Court in the Colony that, under the terms of the Constitution Act the Legislature had not the power to enact the clause in question. And the argument before us has been based on very much the same grounds as the judgment, namely, that the Colonial Legislature had defined and limited powers which they could not exceed; that the power given to them to impose duties was to be executed by themselves only, and could not be intrusted by them wholly or in part to the Governor or any other person or body. It was further argued that the proviso in the 1st section, that all money bills should originate in the Legislative Assembly of the Colony, was an indication that the Imperial Legislature assumed that all legislation in the Colony with respect to taxation should be by bill passed through both Houses.

Two cases have come before this Board in which the powers of

Colonial Legislatures have been a good deal considered, but these cases are of too late a date to have been known to the Supreme Court when their judgment was delivered. The first was the case of *Reg.* v. *Burah* (1), in which the question was whether a section of an Indian Act conferring upon the Lieutenant-Governor of Bengal the power to determine whether the Act, or any part of it, should be applied to a certain district, was or was not ultra vires. In the judgment of this Board, given by the Lord Chancellor, the legislation is declared to be intra vires, and the Lord Chancellor lays down the general law in these terms:—"The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can of course do nothing beyond the limits which circumscribe these powers. But when acting within those limits it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation as large, and of the same nature, as those of Parliament itself."

The same doctrine has been laid down in a later case of *Hodge* v. *The Queen* (2), where the question arose whether the Legislature of Ontario had or had not the power of intrusting to a local authority—a board of commissioners—the power of enacting regulations with respect to their Liquor Licence Act of 1877, of creating offences for the breach of those regulations, and annexing penalties thereto. Their Lordships held that they had that power. It was argued then, as it has been argued to-day, that the local legislature is in the nature of an agent or delegate, and, on the principle delegatus non potest delegare, the local legislature must exercise all its functions itself, and can delegate or intrust none of them to other persons or parties. But the judgment, after reciting that such had been the contention, goes on to say, "It appears to their Lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the Provincial Legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a Legislature for Ontario, and that its Legislative Assembly should have exclu-

(1) 3 App. Cas. 889. (2) 9 App. Cas. 117.

J. C. 1885 POWELL v. APOLLO CANDLE COMPANY.

sive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers, not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample, within the limits prescribed by sect. 92, as the Imperial Parliament in the plenitude of its power possessed or could bestow. Within these limits of subjects and areas the Local Legislature is supreme, and has the same authority as the Imperial Parliament."

These two cases have put an end to a doctrine which appears at one time to have had some currency, that a Colonial Legislature is a delegate of the Imperial Legislature. It is a Legislature restricted in the area of its powers, but within that area unrestricted, and not acting as an agent or a delegate.

Applying these principles to the present case, it appears to their Lordships that the general terms of the 1st section of the Constitution Act, giving power to make laws "for the peace, welfare, and good government of the Colony in all cases whatsoever," and sect. 45, to the effect that it shall be lawful for the Legislature of New South Wales to impose and levy such duties and customs as to them may seem fit, confer plenary powers of legislation comprising within their scope the section of the Customs Consolidation Act now in question. Those sections are subject to some limitations in sects. 44 and 45, which admittedly do not apply to the present case. But it has been argued that the proviso in sect. 1, that all bills for appropriating any part of the public revenue, or for imposing any new rate, tax, or impost, shall originate in the Legislative Assembly in the Colony, is at the least a direction, on the part of the Imperial Parliament, that all levying of taxes in the Colony shall be by bill originating, as in this country, in the Lower House. It may be that the Legislature assumed that, with respect to customs duties, such a course would be pursued as undoubtedly is in accordance with the usages and traditions of this country; but it appears to their Lordships impossible to hold that the words of an Act, which do no more than prescribe the mode of procedure with respect to certain bills, should have the effect of limiting the operation of those bills. The Customs Act containing the clause now in question

may be presumed to have been introduced in the Lower House according to the directions of the statute. But if without the proviso it would be competent to insert this clause in the bill, it is difficult to see how the proviso, which merely requires that the bill shall be introduced in one House and not in the other, can have the effect of making the clause ultra vires. It appears to their Lordships to have no such effect.

It is argued that the tax in question has been imposed by the Governor, and not by the Legislature, who alone had power to impose it. But the duties levied under the Order in Council are really levied by the authority of the Act under which the order is issued. The Legislature has not parted with its perfect control over the Governor, and has the power, of course, at any moment, of withdrawing or altering the power which they have entrusted to him. Under these circumstances their Lordships are of opinion that the judgment of the Supreme Court was wrong in declaring sect. 133 of the Customs Regulation Act of 1879 to be beyond the power of the Legislature.

The only question remaining arises also upon the pleadings. The plaintiffs demurred to the plea of the collector, among other things, on this ground—that it stated merely the opinion of the collector, and not the fact that the stearine was a substitute for a dutiable article, and so on; and they raised the same question further in the third replication, which is in these terms: "The article of merchandise known as stearine did not in fact possess properties in whole or in part which could be used or were intended to be applied for a similar purpose as a certain known dutiable article known as candles." The effect of this replication is to raise the question whether, under sect. 133, the opinion of the collector is the condition precedent of the action of the Governor, or whether the fact is such a condition precedent. The words are: "Whenever any article of merchandise then unknown to the collector is imported, which, in the opinion of the collector or of the commissioners, is apparently a substitute for any known dutiable article, or is apparently designed to evade duty, but possesses properties in the whole or in part which can be used or were intended to be applied for a similar purpose as such dutiable article." It seems to their Lordships that the words, "in the

J. C.
1885
POWELL
v.
APOLLO
CANDLE
COMPANY.

opinion of the collector," govern the whole of this clause, and that if the collector is of opinion that the "article is apparently a substitute for any known dutiable article, or is apparently designed to evade duty," and is of opinion further that it "possesses properties," &c., this opinion, whether right or wrong, authorizes the action of the Governor. The replication, therefore, admitting the opinion of the collector, but alleging the fact to be at variance with it, is bad, and the plea is not bad for averring only the opinion and not the fact.

With respect to an argument which has been raised to the effect that the latter part of the section, directing "that a duty be levied on such article at a rate to be fixed in proportion to the degree in which such unknown article approximates in its qualities to such dutiable article," does not apply if the allegation in the third replication be treated as admitted—as it must be on demurrer—it appears to their Lordships enough to say that this point does not appear to be raised by the replication.

Under these circumstances their Lordships will humbly advise Her Majesty that the judgment appealed against be reversed, that judgment on the demurrers be entered for the defendant, and that the defendant have the cost of the demurrers in the Supreme Court. He will also have the costs of this appeal.

Solicitors for appellant: *John Mackrell, Maton & Co.*
Solicitors for respondents: *Want & Harston.*

[PRIVY COUNCIL.]

THE EXCHANGE BANK OF YARMOUTH PLAINTIFFS; AND BLETHEN . . . . . DEFENDANT.

J. C.* 1885 Feb. 6, 7, 17.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Execution of Deed of Assignment—Effect of Note appended to Signature.

Not every attempt by a form of execution to restrain the full operation of a deed can be treated as a non-execution of it.

Where a deed of assignment by debtors to a trustee for the benefit of all creditors who should execute the deed was executed by the plaintiffs, who appended a note that they executed only in respect of certain claims scheduled to the deed and amounting to $73,531, and it appeared that subsequently thereto they received a sum of money from the trustee by virtue of their execution of the deed:—

Held, that the plaintiffs were bound. The note did not amount to a refusal to execute; and the plaintiffs having received payment under the deed could not be heard to repudiate it, and deny their execution.

Wilkinson v. *Anglo-Californian Gold Mining Company* (1) held to be inapplicable.

APPEAL from an order of the Supreme Court (Dec. 15, 1883) discharging a rule nisi for setting aside a verdict for the respondent in an action wherein the appellant claimed payment of two promissory notes for $6000 and $125 with interest and expenses. The facts are stated in the judgment of their Lordships.

The judgment of the Court below was as follows:—

"The chief argument of plaintiffs' counsel was based on the ground that the plaintiffs had not legally executed the deed; that the execution is wholly void, on account of the condition attached to the signature.

"*Johnson* v. *Osenton* (2) is relied on by plaintiffs. There the question was, whether parties signing the deed had given an effectual assent, under the English Bankruptcy Act, to the

* *Present*:—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

(1) 18 Q. B. (N.S.) 728. (2) Law Rep. 4 Ex. 111.

J. C. 1885 EXCHANGE BANK OF YARMOUTH v. BLETHEN.

composition of the bankrupt, so as to bind non-assenting creditors. The assent was qualified by reserving rights under a former trust deed, and against securities held by the signing creditors. What was decided there, was that the assent was not within the terms of the statute.

"*Wilkinson* v. *Anglo-Californian Gold Mining Company* (1), decided on demurrer in the Court of Queen's Bench, was cited to us to shew that the execution was void. The declaration there alleged that plaintiff duly executed a deed of settlement, except as to a certain provision therein, numbered 179; and that he was entitled to a certificate; and clause 179 was alleged to be part of the deed. Lord Campbell, on the argument, remarked:—"I do not see how there can be a partial execution of the deed." He also said that a partial execution was unknown to the law; and it was decided that the declaration contained no allegation of any execution at all. These cases do not, I think, throw light on the question raised.

"Draper, C.J., in *Fowler* v. *Perrin* (2), decided where there were words added to the signature which had no support from anything in the body of the deed, they could not qualify or restrain the sealed release. In the Supreme Court of Massachusetts, decided in 1833 (*American Bank* v. *Doolittle* (3)), where a creditor executed a deed of assignment for the benefit of creditors, on condition that the property was not then attached, being upon a condition precedent, which, not being performed, rendered the execution inoperative, it was observed that if the condition was of such a nature that it would render the instrument inoperative without the consent of the other parties, then until such assent, given expressly or by implication, the instrument, as the act of the plaintiffs, would be inoperative, or the operation would be suspended. It was also said that "it was questionable whether a release could be executed upon a condition subsequent, for if the deed is once released it would seem to be given for ever."

"In a note to 34 American Dec. 542, a Pennsylvania case (4) is reported, where to the signature of a creditor to a release under

(1) 18 Q. B. (N.S.) 728.
(2) 2 U. C. (Q.B.) 230.
(3) Massachusett's Rep. vol. xxxi., p. 123.
(4) 6 Wharton, 256.

seal was appended a condition that the release should be inoperative unless 25 per cent. of the claim was paid, the release was held to be absolute. The note is of value for its reasoning. The condition will be considered inoperative because of its repugnancy to the assignment in pursuance of which it is executed, and because of its impossibility, since, as the fund realised by the assignment could be divided amongst those only of the creditors who executed absolute release, no part thereof could be possibly distributed to a conditional release, and therefore if the conditions were of any effect it must operate to defeat the release in toto. Also, because, as the release was absolute in terms, it must operate to suspend the right of action of the releasor, and a right of action once suspended cannot be revived.

"In other words, a release cannot be executed to be void on a condition. *Teede* v. *Johnson* (1) was not unlike the present case. There was a recital in the deed of indebtedness to the parties of the second and third part, the trustees and other creditors, in the several sums set opposite their names in the schedule, and then it was witnessed that the estate was assigned to pay the said parties the said sums in the schedule, and then followed a general release. The action was by one of the trustees, who set up by replication that he signed merely as trustee, and that his debt was not in the schedule. It was held that the release being general in its terms, the execution by the plaintiff operated as an extinguishment of the debt.

"In the evidence before us it appears that plaintiffs were included with the preferential creditors for $2000 on a particular transaction, and have received that sum from the trustee, in accordance with the terms of the assignment. I suppose it will be admitted that this sum could only have been received out of the estate on the strength of the assignment; and it seems to me, whatever might be held as to plaintiffs' execution of the instrument being void if raised in some other way, that they cannot now, having received this sum, say, by their replication here, that they did not execute the deed, and thus be rid of their obligation to release the assignor.

"The rule nisi will be discharged, with costs."

(1) 11 Ex. 845.

J. C.
1885
EXCHANGE BANK OF YARMOUTH v. BLETHEN.

The Solicitor-General (Sir *F. Herschell*, Q.C.) and *Jeune*, for the appellant, contended that this decision was erroneous not only as to the effect of the execution, but also as to the receipt of the $2000 estopping the appellant from denying the unconditional execution of the deed. The execution in the particular form adopted was either inoperative altogether, or it merely effected a release in regard to the debts specified in the schedule. The former contention was principally relied upon. A deed is inoperative if the sense in which the parties say they executed it cannot be imported into it. A part execution is no execution at all. Reference was made to *Wilkinson* v. *Anglo-Californian Gold Mining Company* (1), *Johnson* v. *Osenton* (2), and the other cases cited above.

Romer, Q.C., and *Archibald*, for the respondent, contended that the judgment was right. The words added to the signature were inoperative, not the signature. They had no support from anything in the deed, and could not qualify or restrain it. If any effect were to be given to the note appended to the signature, it must be taken as defining or limiting the amount of the claim which the appellant intended to make. Further, the appellant having received the $2000 under the deed, and as a party having rights under the deed thereby affirmed his execution, could not be allowed afterwards to repudiate it.

The Solicitor-General replied.

1885
Feb. 17.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

The action in which the present appeal arises was brought by the Exchange Bank of Yarmouth, the indorsees of two promissory notes, against Mr. Blethen, a prior indorsee. The notes were made, one by Messrs. Dennis & Doane, the other by Mr. Doane alone, payable to the order of the defendant. The defendant indorsed them to a firm of Viels & Dennis, who indorsed them to the plaintiffs. The defence to the action was, that the plaintiffs had released the makers of the notes, and therefore also

(1) 18 Q. B. 728; S. C. 21 L. J. (Q.B.) 327. (2) Law Rep. 4 Ex. 111.

the defendant. It was not disputed that if the makers were released, so was also the indorsee. The proof of the release was this. After the indorsement to the plaintiffs, Dennis & Doane executed a deed purporting to be made between themselves, individually and as partners, of the first part, Jacob Bingay, a trustee, of the second part, and certain creditors mentioned in a schedule marked A, and who shall "accede to these presents within four months from the date hereof," of the third part.

In the deed it is recited (in effect) that Dennis & Doane, being unable to pay their creditors in full, have assigned all their estate and effects to the trustee, for the benefit of their creditors.

The trusts are declared to be, after paying all costs, to pay in full, first, all the claims of such creditors as are inserted in a schedule marked D; then to pay "all other creditors parties hereto who shall have executed these presents within four calendar months from the date hereof, rateably."

Then comes a provision that the creditors shall release all causes of action, debts, and claims of every kind, the widest terms being used, and there follows this proviso:—

"If the creditors of the parties of the first part, parties to these presents, shall not come in and execute this indenture, by themselves or their agents duly authorized, within the time and space of four calendar months from the day of the date of these presents," such creditors shall not be entitled to any distribution, benefit, or advantage under the deed.

Their Lordships are unable to give any meaning to the expression in the beginning of the clause, "parties to these presents," inasmuch as no creditor could become a party to them until he had executed the deed. They therefore reject that expression as insensible, and, reading the clause without it, are of opinion that it makes a condition precedent to taking any benefit under it, the execution of it by all creditors, preferred or not preferred.

A further provision should be noticed, to the effect that "if the demand of any creditor in any schedule shall have been stated as being greater or smaller than it really is, such creditor shall be entitled to the benefit of these presents upon and for, and only upon and for, the amount which may be found to be justly due to him."

J. C
1885
EXCHANGE BANK OF YARMOUTH v. BLETHEN.

The plaintiffs were entered in Schedule D (that of the preferential creditors) for $2000, in Schedule A for $58,309.

The plaintiffs set their seal to the deed, and appended the following note or memorandum to their execution of it:—"The Exchange Bank of Yarmouth, Nova Scotia, for and in respect of, and only for and in respect of, the several claims, notes, bonds, and securities for money mentioned and referred to in the schedule hereunto annexed, and marked, 'Schedule of the Exchange Bank of Yarmouth, Nova Scotia,' said claims amounting, as per said schedule, to $73,531. 92," which schedule was annexed to the deed.

The $73,531. 92 did not include the promissory notes, the subject of this action.

It was contended in the Court below:—

1st. That the qualification in the note appended to Plaintiffs' execution of the deed limited the effect of it.

2nd. That if it did not, the qualified execution amounted, in law, to no execution at all.

The first point was abandoned in the argument before us; the second was insisted on, and the case mainly relied upon in support of this contention was that of *Wilkinson* v. *Anglo-Californian Gold Mining Co.* (1).

In that case the question arose on demurrer. The declaration stated the incorporation of the company (defendant) under 7 & 8 Vict. c. 110, and its formation by a deed of settlement, and averred that the plaintiff, who was a subscriber for shares, "duly executed the said deed of settlement . . . except as to the hereinbefore mentioned No. 179 aforesaid" (No. 179 being a material clause in the deed); whereupon the plaintiff became entitled to a certificate of the shares he had subscribed for.

The statute made the execution of the deed of settlement a condition precedent to the right to obtain a certificate.

It was held that the declaration did not aver a due execution of the deed, inasmuch as an execution of a deed in part only was no execution of it in point of law.

It appears to their Lordships that this case, which affirms an undoubted principle of law, does not apply to the present.

(1) 18 Q. B. 728; and more fully 21 L. J. (Q.B.) 327.

The note appended to the plaintiffs' execution of the deed does not, in their judgment, amount to a non-execution or a refusal to execute any part of the deed; it is at least capable of being interpreted as descriptive of the amount of debt which the plaintiffs intended to claim, being considerably more than that which is set opposite to their name in Schedule A, coupled with an intimation that they did not mean to claim more, and in this view it would not amount to a non-execution of the deed.

It is not every attempt by a form of execution to restrain the full operation of a deed which can be treated as a non-execution of it. An American case (1) has been quoted in the judgment appealed against, where a condition being appended to the execution of a deed of release that it should be inoperative unless 25 per cent. of the claim was paid, the condition was held to be void, and the release absolute. Indeed, it has been admitted that an attempt to make the execution of a deed of release operative only on the occurrence of a condition subsequent would amount to an absolute release.

Their Lordships are of opinion that the execution of the deed by the plaintiffs operated in the terms of the release clause as a release of all debts, among them the debt on the promissory notes, the subject of the action, and that the judgment appealed against was right.

They are further of opinion that the judgment is sustainable on the other ground on which it is placed. They have already intimated their view that the proviso which has been quoted applies to preferential as well as other creditors, and that the plaintiffs would not have been entitled to receive the $2000 under the deed unless they had executed it. Having received that sum by virtue of their execution of the deed they cannot be heard to repudiate it, and to deny their execution.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the judgment appealed against, and dismiss the appeal. The appellant will pay the costs of the appeal.

Solicitors for appellant: *Bompas, Bischoff, Dodgson & Coxe.*
Solicitors for respondent: *Hill, Son & Rickards.*

(1) *Tyson* v. *Dorr*, 6 Wharton, 256.

[PRIVY COUNCIL.]

J. C. 1885 Feb. 5.

DUFFETT . . . . . APPELLANT;

AND

McEVOY . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Victorian Common Law Procedure Act, s. 396—Power of Court to order delivery of Attorney's Bill.

Under sect. 396 of the Victorian Common Law Procedure Act, the Court has power to order delivery of his bill by an attorney, whether or not it has been paid, and whether or not it is one which it would have jurisdiction to refer to taxation.

APPEAL from a judgment of the Supreme Court (July 3, 1882), discharging a rule nisi obtained by the appellant to set aside an order dated the 21st of June, 1882, directing the appellant to deliver to the respondent his bill of costs in a suit for dissolution of marriage wherein the respondent was petitioner.

In that suit the appellant's bill of costs amounted to £1350, of which £600 was paid by the respondent during the course of the suit. The balance, £750, was paid on the 10th of February, 1877, by a promissory note, at three months, duly paid at maturity, and a receipt was given in settlement of all claims.

On the 15th of February, 1882, the respondent took out a summons calling on the appellant to shew cause why he should not deliver his bill of costs in the said suit, with the result as stated above.

J. F. Moulton, and *J. C. Graham*, for the appellant.

The respondent did not appear.

In re Sutton & Elliott (1) was cited.

* *Present*:—LORD BLACKBURN, SIR BARNES PEACOCK, SIR RICHARD COUCH and SIR ARTHUR HOBHOUSE.

(1) 11 Q. B. D. 377.

The judgment of their Lordships was delivered by

LORD BLACKBURN :—

In this case their Lordships will advise Her Majesty to dismiss the appeal. The first question is, whether or not the Court below were right in finding in fact that no bill such as required by statute had been delivered? Had the bill already been delivered, it would have been an answer to the application to have the bill delivered now. Now, upon that question of fact, first the Chief Justice, and then the Supreme Court in the Colony, have found one way; and upon that question of fact it would require very strong grounds to induce their Lordships here, sitting in appeal, to say that they were wrong, even if we thought or entertained much doubt that they were right. But I believe that the individual impression of each of their Lordships is, that if we were to decide upon that as a Court of first instance, upon these affidavits we should have come to the same conclusion that the Court below did, namely, that there has been no proper bill delivered, and therefore no such bill has been paid. That puts an end to that part of the case.

Then the ingenious argument is, that the Court can have no power to order this bill to be delivered, because it is said that the power of the Court to order a bill to be delivered is ancillary merely to taxation, and that it cannot order a bill to be delivered until it is ascertained that the bill is one which at least it would have jurisdiction to refer to taxation, and that is not shewn here, so the bill cannot be ordered to be delivered at all. But their Lordships do not think that, when the Act of Parliament is looked at, that is the true construction of the Act. In the English Act, the Attorneys and Solicitors Act, 6 & 7 Vict. c. 73, there is a proviso in sect. 37 that the Courts and judges in the same cases in which they are respectively authorized to refer a bill which has been delivered, may order a bill to be delivered. That, however, when it is looked to, does not mean to say that no bill shall be ordered to be delivered until it is ascertained that the bill itself is proper to be submitted to taxation. It really comes to this, that the Court of Chancery, which has the power to tax Chancery and general bills, should have the power to order a

J. C. 1885 DUFFETT v. MCEVOY.

bill to be delivered respecting such proceedings, and that the Court of Common Law, which has power to tax a bill for business done in the Court of Common Law, should have the power to order a bill respecting such business to be delivered. Accordingly, in the Colonial Act, the Common Law Procedure Act, in which sect. 37 of the Attorneys and Solicitors Act is broken into several sections, this particular one is changed in its language, and is so worded as to shew clearly enough what those who framed the Common Law Procedure Act in Victoria meant. The enactment is, in sect. 389:—"And provided further that it shall be lawful for the said Court or judge in any case to make such order for the delivery by any attorney, or the executor, administrator, or assignee of any attorney or trustee of his estate of such bill as aforesaid, and for the delivery up of deeds, documents, or papers," and so on, shewing plainly that they had seen that the effect of the proviso in the English Attorneys and Solicitors Act was merely what has been already stated.

Now, that being put aside, their Lordships have to consider the effect of sect. 41 of the Attorneys and Solicitors Act, which is repeated in sect. 396 of the Colonial Act, without any alteration in its terms, and that is: "The payment of any such bill as aforesaid shall in no case preclude the Court or judge from referring such bill for taxation if the special circumstances of the case shall, in the opinion of such Court or judge, appear to require the same, upon such terms and conditions, and subject to such directions as to such Court or judge shall seem right. Provided always that the application for such reference be made within twelve months after payment." Now, the argument is, that where there has been payment of the attorney's demand at all, there a bill should be ordered to be delivered only when it could be ordered to be taxed afterwards, when there are special circumstances, and that it should not be done at all if twelve months has been allowed to elapse after payment; but when the terms of the section are looked at, it does not amount to that. If there had never been any bill at all, which seems to have been the case here, that is to say, nothing that would give any details or items, or enable the party to judge of the goodness of the items, the bill may be ordered to be delivered, it not necessarily following that then it

would be ordered to be taxed, the object of ordering the delivery of a bill being to see whether there are such special circumstances as would cause it to be taxed, and for some reason or other the attorney in the present case has apparently been very reluctant indeed to allow his bill to be seen.

Then it is said that there may be good ground for saying that the payment of this promissory note, for which a receipt was taken (and it seems to have been proved that that was done), and the fact that several years had elapsed before there was any attempt to have the bill delivered, may shew that in the exercise of its discretion the Court should not order the bill to be taxed, or anything else done. Their Lordships have not got any materials before them to enable them to give an opinion as to what the result would be. Their Lordships merely say this, that at present the order appealed from was rightly made, and that the attorney must deliver the bill, and then the Court will say what, if anything, is to be done if an application is made when it is delivered. The consequence is, that their Lordships, as I have already said, will advise Her Majesty to dismiss this appeal.

Solicitors for appellant: *Gamlen, Burdett, & Woodhouse.*

[PRIVY COUNCIL.]

J. C.*
1884
March 25.

In the Matter of the ENDOWED SCHOOLS ACT, 1869, 32 & 33 Vict. c. 56, and the amending Acts.

AND

In the Matter of the St. LEONARD, SHOREDITCH, PAROCHIAL SCHOOLS, and the Endowments relating thereto.

32 & 33 *Vict. c.* 56, *ss.* 9, 19, *sub-s.* 2—36 & 37 *Vict. c.* 87, *s.* 7—*Denominational School—Powers of Commissioners—Original Subscribers—Effect of Regulations.*

Where the Commissioners by their scheme provided that certain endowments which had theretofore been applied in carrying on the schools of a particular parish, should thenceforth be applied in exhibitions for the benefit of a larger area of schools; *held*, that this was within their powers under sect. 9 of the Act of 1869, and that being so the way in which those powers had been exercised was not the proper subject of appeal.

Held, that a charity which has no instrument of foundation, or statutes, or duly authorized regulations impressing upon it a denominational character, does not fall within the 19th clause of the Act of 1869, or the 7th clause of the Act of 1873. Its trustees cannot impress upon it that character, nor is any practice for the time being as to the application of its funds, sufficient evidence of there ever having been regulations in existence which prescribed it.

Where a charity is established by subscriptions, the original subscribers alone are the founders, the later benefactions are on the footing of the original foundation. If its regulations are relied upon as impressing upon it a denominational character, they must be shewn to have been authorized by all the founders, and to have been issued before fifty years from their deaths.

THIS was an appeal by the trustees for the administration of the charity schools of the parish of St. Leonard's, Shoreditch, in the county of Middlesex, and by the vicar of the parish. The petition, after referring to 32 & 33 Vict. c. 56, s. 19, sub-s. 2, alleged that the girls' school was agreed to be founded at a meeting of some of the parishioners held on the 25th of January, 1709, a boys' school having been founded four years earlier in a

* *Present*:—The Lord Chancellor (Earl of Selborne), Sir Barnes Peacock, Sir Robert P. Collier, and Sir Richard Couch.

similar manner, and under the presidency of the then vicar; that trustees were elected who, by the direction of the meeting, agreed with the vicar to have seats made in the church for the girls' school; that in 1721, a lease had been granted to them; that in 1724, a parishioner bequeathed certain funds to these schools amongst others "where the education is according to the Church of England," of which they had ever since had the benefit; that the scholars regularly attended the Church of England service, and were taught the catechism of that Church; and that regulations to that effect had been read and confirmed in 1774, as appeared from an entry in the minute-book. It further alleged that in 1880 the surviving trustees of the boys' school applied to the Charity Commissioners for the appointment of new trustees, and, with the consent of the appellants, for the amalgamation of the trusts of the boys' and girls' school. The Commissioners in 1882 submitted to the trustees of the girls' school a copy of the scheme, the nature of which sufficiently appears in the judgment of their Lordships. The trustees in reply contended that, under the above section, the school was exempt from the provisions of the Act, as being denominational within the meaning of the Act. The Commissioners, however, proceeded with their scheme, which was approved by the Committee of the Council of Education.

Dr. Phillimore, Q.C., and *Richards*, for the appellants, contended that her Majesty's approval in Council should be withheld from the scheme. It made no provision for the religious teaching of the exhibitioners, nor for attendance at the Church of England worship. It was argued that this was directed by the trustees and founders, that is the original subscribers in their lifetime. They referred to certain regulations of the girls' school, which purported to have been read and confirmed in 1774, which the scheme did not recognise. They were made within the lifetime of the founders, or within fifty years after their death, and impressed a denominational character on the school. The vicar was always a member or president of the trustees, and the scheme did not provide for his continuance in office. Reference was made to s. 9 of 32 & 33 Vict. c. 56, and it was contended that the scheme was not within the powers of the Commissioners.

J. C.
1884
IN THE MATTER OF THE ENDOWED SCHOOLS ACT, 1869.
IN THE MATTER OF THE ST. LEONARD, SHOREDITCH, PAROCHIAL SCHOOLS.

Davey, Q.C., and *F. Vaughan Hawkins*, for the respondents, were not called upon.

The judgment of their Lordships was delivered by

EARL OF SELBORNE, L.C.:—

Their Lordships have considered the arguments which they have heard, and they do not think it necessary to call upon counsel to reply to them.

It may be convenient, first, to notice the last point suggested by Dr. Phillimore upon the 9th clause of the Act of 1869, which gives power in very large and general terms to the Commissioners, "by the scheme, in such manner as may render any educational endowment most conducive to the advancement of the education of boys and girls, or either of them, to alter and add to any existing and to make new trusts, directions, and provisions in lieu of any existing trusts, directions, and provisions which affect such endowment and the education promoted thereby, including the consolidation of two or more such endowments, or the division of one endowment into two or more endowments"; the words "educational endowments" having a very large interpretation, which includes education at school of boys and girls, or either of them, and exhibitions tenable at a school or university or elsewhere. In this case the endowments appear to have been used till the scheme was made for the purpose of the education at school of boys and girls; and the Commissioners, for whatever reason, have thought that those endowments may be made useful if they are not any longer applied in carrying on the particular schools in the parish of St. Leonard, Shoreditch, but are applied in exhibitions for the benefit of a larger area of schools for boys and for girls. Their Lordships are unable to find any solid reason for saying that this was not within the powers of the Commissioners. Taking it to have been within their powers, no question is or can be raised as to the way in which they have exercised them; and that is not a proper subject of appeal if the scheme was not in that respect unauthorized by the Act.

Having disposed of that particular objection, there remains the principal one, which is, that this is a denominational charity

within the meaning of the 19th clause of the Act of 1869 and the 7th clause of the Act of 1873. Now it is impossible to read the 19th clause of the Act of 1869 without being struck by the care and anxiety which the legislature has exhibited there to prevent denominational restrictions from being applied to any school as to which there was not demonstrative evidence that the original founders of the school had not only formed, but expressed, an intention that the children should be instructed according to the doctrines or formularies of a particular church, sect, or denomination, or, in the added words of the later Act, should be members of a particular church, sect, or denomination. It is impossible not to be struck by the anxiety which the legislature has displayed to exclude, not only every uncertain, but also every merely probable, implication from practice alone of such an intention; for it is required, first of all, that the denominational purpose should be manifested by the express terms, either of the original instrument of foundation, or of some statutes or regulations. Perhaps it is not absolutely necessary to say that regulations within the meaning of the clause could not have been oral, but it is tolerably plain that there would be great difficulty in the proof of any such oral regulations, even if binding; and certainly the other words, "instrument of foundation or statutes," point with great distinctness to written instruments. The legislature, by requiring "express terms," going for the present no further, has manifested a clear intention to exclude mere implication. It is not that only. Not only must it be done by the express terms of that which, in two cases at all events, must necessarily be an instrument in writing, and in the third case could scarcely be otherwise; but the instrument of foundation, statutes, or regulations, must in the next place have been made by the founder or by his authority, and if by the founder of course in his lifetime. What is meant by founder, and what is meant by authority? Now, in the ordinary case of a foundation by one or more individual persons who created the endowment, there is of course no difficulty in the application of those words. But their Lordships have here to deal with a charity not so founded, but which was commenced by subscriptions at Michaelmas 1705. The Bishop of Oxford was asked at that time to preach

J. C. 1884

IN THE MATTER OF THE ENDOWED SCHOOLS ACT, 1869.

IN THE MATTER OF THE ST. LEONARD, SHOREDITCH, PAROCHIAL SCHOOLS.

a charity sermon for the school; and in the list of benefactions the first benefaction appears to have been given in 1706, and it goes on at different dates; a collection being made for building in 1722.

Now let us consider what is the reasonable manner of applying to such a charity the word "founder." It is reasonably clear that not every subscriber or contributor could be a founder having control over the school, or capable within the meaning of the Act of Parliament of impressing on it, by his own act or by his own authority a denominational character. It is also reasonably plain, when you have once started with a foundation in 1705, though by small beginnings, yet that everything afterwards added, every accretion to the original subscriptions, which was not an endowment for any new and special purpose, must be taken to be upon the footing of the original foundation; not a new foundation, but something contributed for the purpose of the original foundation. You are carried back, therefore, in considering who ought to be regarded as the founder or founders, to the very inception of the charity, to the very first subscriptions, in this case to the years 1705 or 1706. Now it is quite conceivable that a number of persons might have met at that time, and might have come to a common agreement as to the purposes for which they should subscribe and solicit subscriptions; and if that had been embodied in writing, and if they had solicited subscriptions on the footing that either they themselves were to make a law for the charity and give it statutes, or that this was to be done by others in a particular manner, or if in any original documents soliciting subscriptions there had been a written law laid down for the charity expressing the purposes for which it was to be founded, those persons so initiating the subscriptions, and so declaring the purpose for which they were made and solicited, might be regarded as founders within the meaning of this clause. But it appears to their Lordships to be quite impossible to attribute that character to those who come after them—whether they contributed to the building fund or any other fund in aid of the existing charity or not. They did not found the charity; they found it existing; they merely aided and assisted it.

The question in this case is, whether the conditions of this clause of the statute are shewn to have been fulfilled as to the

charity which had its foundation or inception in the only sense which can bring the words of the clause into play at all,—as early as 1705 or 1706. The clause says that there must be express terms. Here it is admitted there is no original instrument of foundation at all; there are no statutes, therefore they may be laid aside. Then we come to the other word "regulations," and we must find by proper evidence the express terms of some regulations which were made by the founder or by his authority; and it is clear that there are no regulations of which the express terms appear, directly or indirectly, made by the original founder, or by his authority; and that last term, "by his authority," is not without any limit of time, but must be either in his lifetime or within fifty years after his death.

If it is sound reason that the original founders must be taken to be those persons who first subscribed to and collected subscriptions for this charity in the years 1705 and 1706, what is there upon which the conclusion can possibly be founded, that any regulations requiring in express terms that the scholars should be instructed according to the doctrine or formularies of the Church of England, or should be members of that Church, what is there from which it can be inferred that any such regulations were ever made, and still more that they were made within fifty years after the death of the original founders, and by their authority? The only thing brought forward in support of the conclusion that there were any such regulations consists of certain entries in books, which shew that as a matter of fact the children were taken to church, and probably that they were instructed in the catechism. Suppose it to be so, there is all the difference in the world between a practice for the time being and statutes or regulations expressly requiring that such a practice should always be observed. The clause in the Act would not be satisfied without statutes or regulations in express terms; and the manifest purpose of the clause would be defeated as to almost every school in the kingdom, not of very recent origin indeed, if it were held that mere practice should be taken as sufficient evidence of there having been at some time or other regulations made under the authority of the founder expressly requiring that practice always to be observed.

J. C.
1884
In the Matter of the Endowed Schools Act, 1869.
In the Matter of the St. Leonard, Shoreditch, Parochial Schools.

That disposes of everything except the regulations of 1774. Now, if their Lordships had thought it necessary to hear counsel for the Commissioners, it is probable that some argument might have been addressed to them as to the effect of those regulations and whether they would be sufficient, even if made within fifty years, or by the founder, to establish the denominational character of these schools. But, not having heard the counsel on the other side, their Lordships are ready to assume, for the present purpose, that what appears upon the face of those regulations, if they had been made by the original founders, might have been enough. They do not, of course, decide that it would have been so. But what is the evidence that those regulations were made by the authority of the original founders, or were made within fifty years after their deaths, which may also be assumed for this purpose to mean the death of the last survivor. The original foundation was nearly seventy years before the date of those regulations—of those orders. It is more probable than not, at all events, that the original founders were in 1705 at least persons of full age—twenty-one years of age. They might have been living within the fifty years before 1774. The burden of proof as to this is upon those who allege that the case is brought within the clause of the statute, and no attempt has been made to prove that any one of the original founders was living within fifty years before 1774, which would be necessary to make it come within the limit of time, unless we are to assume that Mr. Collman was one of the original founders. All, however, that we know about Mr. Collman is, that at a date considerably later than the original foundation, 1718, he appears as a trustee and as de facto treasurer, and taking an active part in the management of the charity. His name does not appear in the list of benefactors as an original contributor; and if he was not, he was not a founder who could himself have made statutes or given any authority to do so. Then there is an equal defect of the necessary evidence of authority, even if it were known that some of the original founders were living within fifty years of 1774. What is the evidence that the rules and orders of that date were made by the authority of those original founders? The authority of some of those original founders might not have been enough—it must have been that of all the

original founders. Is the mere fact that the management of the charity was carried on by certain trustees enough to lead to an inference of law that they might at any time make rules impressing a new character, a more definitely denominational character than it had before, upon the foundation? They might, if that doctrine were tenable, have in many other respects altered the conditions of the charity, and might have made it more or less beneficial according to their mere will and pleasure. It was admitted—no other answer could have been given to the question—that if they had changed its character, and made it denominational in any new or different way, as, for instance, a Roman Catholic school or a Jews' school, in 1774, they would have been guilty of a gross breach of trust, for which no authority whatever could have been presumed, and which the Court of Chancery of that day would most undoubtedly have corrected. If they could not impress upon it any new denominational character, could they impress upon it any denominational character of a binding nature different from that which it originally had? Could they do that which this clause contemplates—exclude from the school, if otherwise admissible to it, any persons who were not willing to learn or to be instructed according to the doctrine or formularies of any particular church, sect, or denomination—not merely exclude them by way of management or discipline from year to year, but as by statute and regulation for ever?

It would be impossible to infer that the original founders intended, under mere ordinary powers of management, to give any such authority to the managers for the time being. The result is, that the case is not brought within this clause of the statute, either by the orders of 1774 or by any other means; and that the petition fails.

Their Lordships will therefore humbly recommend Her Majesty that the Scheme of the Charity Commissioners relating to these foundations should be approved.

Solicitors for petitioners: *Funston & Hooper.*
Solicitors for respondents: *Farrer & Co.*

[PRIVY COUNCIL.]

J. C.*
1885
Feb. 10, 11;
March 25.

LOUIS ERVEY ESCALLIER AND HENRIETTE E. ESCALLIER . . . . . } APPELLANTS;

AND

JOHN EUBERT ESCALLIER AND OTHERS RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD.

Law of Trinidad—Status of Children born before Marriage—Law of Inheritance—Ordinance No. 24 of 1845, s. 5, and No. 7 of 1858, s. 7.

According to the Spanish laws originally in force in Trinidad, children born before marriage (contracted before the 12th of March, 1846), have the same rights of inheritance from their father and mother as children born after marriage.

Sect. 12 of Ordinance No. 24 of 1845, while preventing marriage after that date from legitimating the ante nati children, does not take away the status of legitimacy previously acquired.

Where a mother married before that date, died intestate in 1862, leaving seven children, three of whom were ante nati and four post nati, *held*, that each by inheritance took one seventh of the estate which she had acquired by purchase under sect. 5 of No. 24 of 1845.

Held, with regard to the shares of two ante nati who had died thereafter intestate without issue, that under sect. 5 above cited and sect. 7 of No. 7 of 1858, they were divisible equally amongst the four surviving children, whether ante nati or post nati, and the issue of a deceased daughter.

APPEAL against portions of a decree of the Supreme Court (April 18, 1882), made on the suit coming on for further consideration upon the certificate of Court, J., to whom it had been referred to make certain inquiries and to take certain accounts directed under the original decree of the Supreme Court in Equity (May 6, 1879). The portions were (1) so far as it declared that the plaintiff John Eubert Escallier (since deceased), as the eldest son born after the marriage of his father and mother, was entitled as heir of his brothers Henry Ernest Escallier and James Philip Escallier, respectively deceased, to their respective shares, being one seventh each of the estates and succession of

* *Present*:—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

their mother Marie Clotilde Escallier, deceased, the wife of Jacques Ernest Escallier, also deceased; (2) so far as it declared that the appellants and respondent James Edward Escallier were not entitled to elect whether they would take the benefits given to them respectively, by the will of their father, or take as heirs of their mother and their legitimate portions as indefeasible heirs of their father; and (3) so far as it ordered that the amount which on taking certain accounts thereby directed should be certified to be due from the appellant Louis Ervey, including a certain sum of $11,052. 66*c.* should be paid by him into Court, with interest at 6 per cent. per annum.

The facts of the case are set forth in the judgment of their Lordships.

Leith, Q.C., and *Rigby*, Q.C. (*Speed* with them), for the appellants and the respondent James Edward Escallier, contended in reference to the first portion of the decree cited above, that it erroneously decided against the claim of the appellant Louis Ervey Escallier, who, as the eldest surviving son of Marie and her husband, was entitled to succeed in preference to the eldest son born after their marriage. That appellant together with his two deceased brothers, though born before the marriage of their parents, had been, as was expressly admitted by the plaintiff, duly legitimated by such subsequent marriage, which took place in the island wherein both parties were domiciled according to the local law of Trinidad. That law gave to the ante nati the same rights of inheritance to their parents as it gave to the post nati. The two sets of children stood on the same footing as regards the status of legitimacy and the right of inheritance to their parents. The local law at the time of the marriage was the Spanish law. By that law a quasi partnership, as declared by the Supreme Court, was created between the spouses in respect of all property acquired by purchase by both or either of them during the continuance of the marriage, called Ganancial property, the husband having certain powers of disposition over the partnership property. The partnership and the powers ceased with the marriage, and therefore on the death of the wife the husband and the wife's heirs became tenants in common of the

J. C. 1885 ESCALLIER v. ESCALLIER.

partnership property, one half thereof vesting in the husband, and the other half in the seven heirs and representatives of the wife in equal sevenths. On the death of Henry Ernest intestate and without issue, his share descended upon Jacques Philip, his eldest surviving brother, as his heir in the maternal line. On the death of Jacques Philip intestate and without issue, his two sevenths descended to the appellant Louis Ervey, as his eldest surviving brother and heir in the maternal line. Reference was made to Ordinance No. 24 of 1845, sects. 5 and 12, and to Ordinance No. 7 of 1858: *Stow* v. *Blackburn* (1), *Re Don's Estate* (2), *Ingilby* v. *Amcotts* (3).

In regard to the second portion of the decree above cited, they contended that as the will of the father Jacques Ernest professed to devise amongst his children real estate, to certain shares of which they were entitled by law as above, and also real estate and other property of his own, a case of election arose. Accordingly the appellants were entitled to elect (subject to the ordinary conditions) whether they would take under or against the will. They had exercised that right, and had in writing dated the 25th of November, 1881, elected to take as against the will their respective shares as heirs of their mother, and their legitimate portions as indefeasible heirs of their father. They should have been held entitled so to do. Thirdly, that the order for payment into Court was premature.

L. Yate Lee, for the respondents, other than James Edward, contended that the decree was right. John Eubert being the eldest son born in lawful wedlock, and living at the time of their deaths, was their heir-at-law, and not Louis Ervey, who was born before marriage. Reference was made to *In re Goodman's Trusts* (4). As regards election, the appellant Louis Ervey had by his answer filed in the suit, and he and the other appellant and the respondent James Edward had orally by their counsel at the hearing on the 6th of May, 1879, and otherwise, elected to take under the will of the father. The order for payment into Court was right.

(1) 1 Mood. & Rob. 547.
(2) 4 Drew. 194.
(3) 21 Beav. 585, 593.
(4) 17 Ch. D. 266.

Rigby, Q.C., replied.

Mar. 25. The judgment of their Lordships was delivered by SIR ARTHUR HOBHOUSE :—

The position of the Escallier family and the questions arising among them will be best understood by reference to a pedigree which their Lordships have caused to be framed for the purpose of this judgment (see p. 316). It is based on the findings in the Judge's certificate of the 7th of March, 1882.

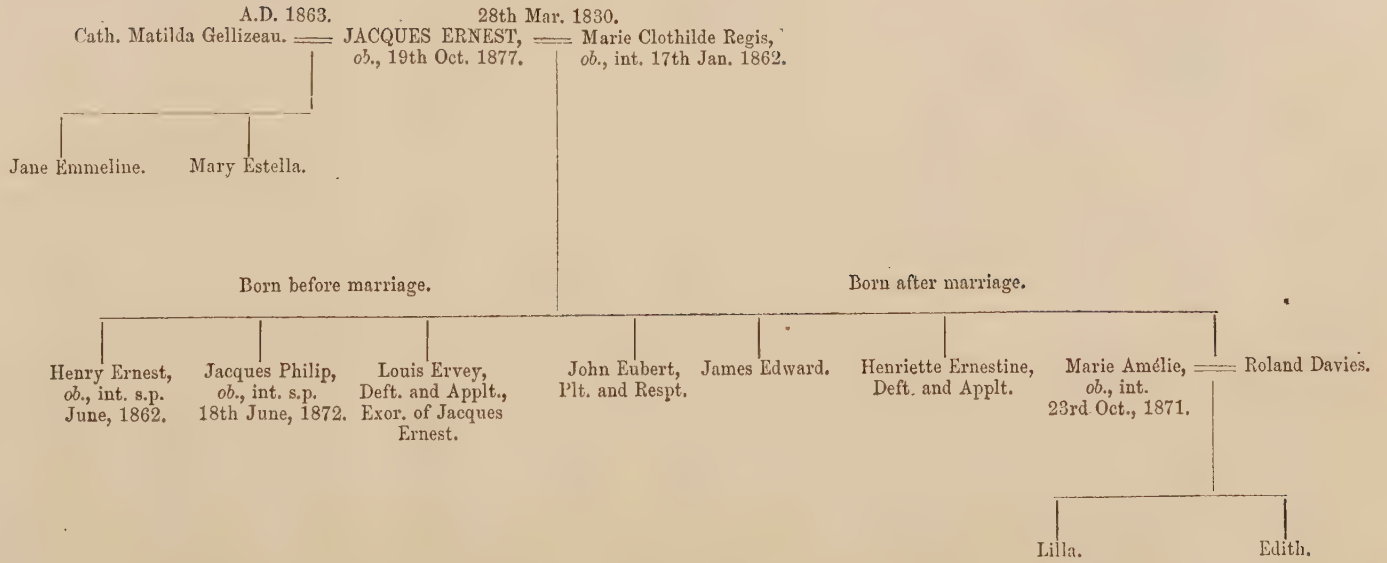
The first question which the Supreme Court had to decide relates to the succession of Marie Clotilde's children to her share of the Ganancial property. By their judgment upon the hearing of the cause on the 6th of May, 1879, they decided that the whole seven took in equal shares.

They give their reasons as follows :—

"There is no doubt that, according to the Spanish laws in force in this island at the time of the intermarriage of the said Jacques Ernest Escallier and Marie Clotilde Regis, his first wife, by the fact of their marriage, a quasi partnership was created between them in respect of all property acquired by purchase by both or either of them during the marriage. It is also clear that these laws gave to the children born before marriage the same rights to the inheritance of their father and mother as to the children born after marriage, and that those rights having been saved by sect. 12 of Ordinance No. 24 of 1845, there is therefore no difference between the ante nati and post nati children of the marriage of the said Marie Clotilde Regis and Jacques Ernest Escallier."

The Court here have assumed, though they have not said, that the subsequent Ordinance of 1858, sect. 1, which requires that when any question arises after that Ordinance comes into force, "as to the effect of any intestacy or partial intestacy, or the devolution of any property, real or personal, by reason of such intestacy or partial intestacy, every such question shall be decided according to the law of England," did not apply to the intestacy of Marie Clotilde, though occurring some years after the Ordinance of 1858 came into force. The learned Judges have not set

Pedigree of Escallier Family.


A.D. 1863.
Cath. Matilda Gellizeau.
28th Mar. 1830.
JACQUES ERNEST, ob., 19th Oct. 1877.
Marie Clothilde Regis, ob., int. 17th Jan. 1862.
Jane Emmeline.
Mary Estella.
Born before marriage.
Born after marriage.
Henry Ernest, ob., int. s.p. June, 1862.
Jacques Philip, ob., int. s.p. 18th June, 1872.
Louis Ervey, Deft. and Applt., Exor. of Jacques Ernest.
John Eubert, Plt. and Respt.
James Edward.
Henriette Ernestine, Deft. and Applt.
Marie Amélie, ob., int. 23rd Oct., 1871.
Roland Davies.
Lilla.
Edith.

forth the grounds on which they considered that the old law was saved by sect. 12 of the Ordinance of 1845, but their decision may be rested on the true construction of sect. 5 of that Ordinance.

Other questions relating to the bar of the suit by lapse of time, and to the will of Jacques Philip, were decided at the hearing, and are out of consideration now. With respect to the inheritances of the two ante nati, Henry Ernest and Jacques Philip, all that was decided at the hearing was, that their shares did not devolve upon their father Jacques Ernest, and that, the claim of the Crown to take by escheat being abandoned and requiring no discussion, the bill should be dismissed with costs as against the Attorney General.

At the hearing of the 18th of April, 1882, for further consideration, the Court declared that the shares of the two deceased ante nati had devolved upon the plaintiff as the eldest of the post nati. Their reasons were not stated at the time, but by the desire of this Committee were put into writing on the 25th of January, 1884, and are in the record. Shortly stated, they are as follows:—Sect. 1 of the Ordinance of 1858 applies the law of England to all successions of land in Trinidad ab intestato. Sect. 11 repeals all laws in force at the cession of the island relating to the same subject: the exceptions from these provisions are not applicable to the present point: part of the law of England is the well known doctrine of *Doe* v. *Vardill* (1), which requires birth in wedlock as a condition of succeeding by inheritance to land in England: therefore the same condition is now necessary for succeeding by inheritance to land in Trinidad. Then they conclude, "on the authority of the above-mentioned case, the Court was of opinion that the shares of the said H. E. Escallier and J. P. Escallier went to the plaintiff as being the eldest remaining brother born in lawful wedlock." By the appellants' case it is claimed that these two shares have devolved on the appellant Louis Ervey as the eldest surviving brother of the two intestates.

The learned Judges do not say why they consider that the exceptions contained in the Ordinance of 1858 are not applicable

(1) 5 B. & C. 438; 2 Cl. & Fin. 571.

J. C. 1885 ESCALLIER v. ESCALLIER.

to the present point; neither do they explain the steps by which they reach the conclusion that the doctrine of *Doe* v. *Vardill* (1) can operate to make one of the post nati the heir of any of the ante nati. In the case of *Don's Estate* (2) it was held to have the contrary effect. But it is not necessary to express any opinion as to this, if sect. 5 of No. 24 of 1845 applies as much to the shares of the intestate sons as to the entire succession of the intestate mother, and it is not affected by the Ordinance of 1858.

It is convenient first to treat the case as if the deaths intestate, which in fact took place after 1858, had taken place after the 12th of March, 1846, when the Ordinance of 1845 came into force, but before 1858, and as if the question had been raised as to the sucession before 1858. When it is ascertained what would then be the true construction of the Ordinance No. 24 of 1845, the question must be considered what effect, if any, the Ordinance of 1858 has in altering the law.

The Ordinance No. 24 of 1845 is, as far as regards the first four sections, an exact transcript of the first four sections of 3 & 4 Will. 4, c. 106. The 6th, 7th, 8th, 9th, and 10th sections are exact transcripts of the 5th, 6th, 7th, 8th, and 9th sections of the same statute. So far the Ordinance complies with the object stated in its preamble, "that it is expedient that the law of inheritance in this colony should be assimilated to the law of England."

The 12th section prevents the celebration of a marriage after the 12th of March, 1846, from legitimating the ante nati children. But the ante nati children of Marie Clotilde had already acquired the status of legitimate children for every purpose except that of succeeding as heirs to real estate in England; and instead of saying, as is said by the Court below, that sect. 12 saves those rights, it would be more correct to say that there is nothing in that section to take them away.

But sect. 5 is in the following words:—

"And be it enacted that, as amongst the children or other issue of the purchaser, that there shall be no right of primogeniture nor preference of males to females, but such children, and the issue of any deceased child for the share or portion of such child, shall inherit equally as co-heirs; but as amongst collateral

(1) 5 B. & C. 438; 2 Cl. & Fin. 571. (2) 4 Drew. 194.

relations the same person shall be heir who in the like case would answer the description of heir according to the law of England, so that males shall be preferred to females, and the elder brother shall inherit to the exclusion of his younger brothers, and the eldest son of the elder brother shall inherit to the exclusion of the brothers of such elder brother."

This enactment is introduced clumsily and out of place, but it establishes in the law of Trinidad rules of inheritance which are neither the English law of primogeniture nor yet the old Spanish law of equal succession

It is not questioned that on the death of Marie Clotilde leaving seven children (some ante nati and some post nati, some sons and some daughters), the Court rightly held that one seventh of the estate of Marie Clotilde went to each of the seven children, without any distinction between post nati and ante nati or sons and daughters. The words "but such children and the issue of any deceased child for the share or portion of such child shall inherit equally as coheirs," do not, as it seems to their Lordships, refer to the rule introduced for the first time by the Ordinance for the purpose of tracing the descent from the purchaser, but merely express the nature of the interests which the children and issue are to take inter se.

But as Henry Ernest and Jacques Philip, both ante nati, survived the purchaser their mother, and died intestate without children, the further question arises, and it is upon that the appeal is brought, what is the effect of the section 5 upon the succession to those two sevenths which vested in the two ante nati on the death of Marie Clotilde the purchaser.

The five children of Marie Clotilde who survived the two eldest sons, all fell under the description of "children or other issue" of Marie Clotilde, and of "collaterals" to the two intestates. What then is the true construction of sect. 5 as applicable to such a state of facts, assuming for the moment, contrary to the fact, that the question had arisen before 1858?

The answer seems to their Lordships to depend upon what is the antecedent to which the word "collateral" is a relative. The general rule is that the relative relates to the last antecedent. Here the word "purchaser" is the only antecedent expressed. And

J. C. 1885 ESCALLIER v. ESCALLIER.

though this general rule may be got rid of when applying it will work an absurd result, or perhaps even a result contrary to what must have been contemplated, that is so far from being the case here, that their Lordships think those who framed the 5th section, if they had foreseen this case, would probably have used clearer language to express the same result, viz., that the four surviving children of the purchaser, and the issue of the deceased daughter, should each take one fifth of the two sevenths which had, on the death of the purchaser, vested in her two deceased sons.

But in fact those deaths were all after 1858, and the question arises what is the effect of the Ordinance No. 7 of 1858 on the case. The Court below have decided that it totally changes it. Their reasons, as far as it is necessary to notice them, are as follows:—

"According to sect. 5 of Ordinance No. 24 of 1845, which came into operation on the 12th of March, 1846: 'Amongst collateral relations the same person shall be heir who in the like case would answer the description of heir according to the law of England.'

"According to sect. 1 of Ordinance No. 7 of 1858, all questions as to the effect of intestacy or partial intestacy, or the devolution or distribution of any property, real or personal, by reason of such intestacy or partial intestacy, shall be decided according to the law of England.

"Several exceptions are contained in sects. 5, 6, 7, 8 which are not applicable to the present point."

It has been observed that the judges below do not give their reasons for what their Lordships cannot but think a hasty opinion that sect. 7, to say nothing of sect. 6, is not applicable to the present point.

The 7th section is in the following terms: "Provided also, that this Ordinance shall not affect the right of the children or other issue of any person to inherit equally as co-heirs of such person."

If the true construction of sect. 5 of No. 24, 1845, be that already put upon it, it would seem that the right of the five surviving children of Marie Clotilde to inherit as her co-heirs could hardly have been more expressly saved. No doubt the word "purchaser,"

might have been used, but that would not make the sense more clear.

The two shares in question have been spoken of as devolving in fifths for the sake of brevity, and because that is the ultimate result of the two deaths. Of course it would not be the formal process of devolution; but the share of the one first dying (it is not shewn which did die first) would be divisible into sixths, and then the share of the survivor, including his accrued sixth, into fifths.

The result is, that on this part of the case the decree under appeal must be varied, and a declaration made in favour of the appellants and of those in the same interest with them. There are still some lesser points to dispose of.

Jacques Ernest assumed by his will to make specific devises of the Ganancial property among his children, who have been declared the indefeasible heirs of Marie Clotilde's share of it. In respect of those devises, and in respect of the legitimate portions of the testator's children, a case for election arises. On the 25th of November, 1881, Louis Ervey, James Edward, and Henriette Ernestine filed a declaration that they claimed the benefits to which they then believed themselves to be entitled as indefeasible heirs of their father and mother. This was intended as an election to take against the will. But, at the hearing of the 18th of April, 1882, their right to elect was disputed, and by the decree then made the Court declared that they were not entitled to elect, but that Lilla and Edith Davies, being infants, were entitled.

The reasons given by the judges for this decision are as follows:—

"The reasons of the Court on the point of election were that the contention of the defendants, Louis Ervey Escallier, James Edward Escallier, and Henriette Ernestine Escallier (who were of age), by their answer, and orally at the original hearing which took place as far back as the 6th of May, 1879, had been in favour of the will. Their election to take under the will had already been made, and it was therefore too late for them to elect to take as heirs."

There must be some mistake about this. Neither James Edward nor Henriette Ernestine put in any answer, nor, as

J. C. 1885 ESCALLIER v. ESCALLIER.

appears by the preamble to the decree made at the hearing, did any one then appear for them. Louis Ervey did put in an answer, but there is nothing in it which so much as points to any question of election. If he did no more at the hearing than he did by his answer, he made no election. He was certainly not in a good position to elect when important questions remained undecided. Even the declaration of November, 1881, proceeds on a theory of his interests which is now held to be unsound. But the three adults adhere to that election, and their Lordships hold that they are entitled to do so.

It was suggested at the bar that Louis Ervey was precluded by sect. 13 of the Ordinance of 1845, from claiming any legitimate portion of his father's estate, and that he could not make such an election as he assumed to make. The suit seems to have been conducted on a different theory, but their Lordships express no opinion about it, because Louis Ervey desires to take against the will whatever his rights may be. Of course, he cannot by his declaration give himself any greater rights than he has got.

The appellant, Louis Ervey, also objects to the following portion of the decree:—

"That the said judge do take an account of all moneys received or paid by the said Louis Ervey Escallier on account of the estate and succession of the said testator since the 19th day of October, 1877, and do ascertain what is due by the said Louis Ervey Escallier on foot of such account, including the sum of eleven thousand and fifty-two dollars and sixty-six cents ($11,052. 66c.), mentioned in the said certificate as due by the said Louis Ervey Escallier, and interest on the same at the rate of six dollars per centum per annum; and the said Louis Ervey Escallier do pay such balance, when ascertained, into Court to the credit of this cause."

The certificate shews no ground for charging Louis Ervey with interest on this balance. It shews a balance due from Gellizeau the co-executor, and one due from the two executors jointly, and in each of those cases the certificate shews that interest is payable. It is not usual to charge interest against an executor, unless he has given ground for it by neglect or by making profit of the money, or in some other way. There can hardly have been

any misconduct on Louis Ervey's part, seeing that the same decree makes him receiver of the estate. The learned Judges give no reason for this decision; indeed they say that the only points raised at the hearing for further consideration were those which have been already dealt with, viz., the succession to the shares of Henry Ernest and Jacques Philip, and the case of election. Their Lordships cannot help thinking that there has been some mistake on this point also. At all events they think the decree should be varied in this part of it.

It would seem to be quite right that Louis Ervey should have been ordered at once to pay in the balance found due from him, and that the accounts of his receipts and payments should be continued. But the decree does not do that. It directs a new account, not against both executors, but against Louis Ervey alone, from the day of the testator's death, thereby overlapping and apparently opening the accounts already taken and stated in the certificate which has been confirmed, and the balance found by which had been treated as a fixed sum due from Louis Ervey. It postpones payment of the balance found by the certificate until the new account has been taken. And it charges him with interest in terms which, though not free from ambiguity, certainly extend to the balance of $11,052. 66c., the payment of which is postponed, and to such other balance as may be found due from him under circumstances at present unknown, and may be taken to have a wider meaning. Though their Lordships are clear that Louis Ervey has a right to complain of such a direction, it is impossible that they can know what is the proper order to make now, and they think that the Supreme Court should be left to work it out.

As the matter is of some complexity, their Lordships think it may be useful to the parties if they now state in some detail the heads of the decree which they will humbly advise Her Majesty to make. They are as follow:—

(*a.*) Vary the decree of the 18th of April, 1882, by striking out of it the declaration relating to the shares of Henry Ernest Escallier and Jacques Philip Escallier, and by substituting for it the following declaration:—Declare that upon the death of the two deceased children of Marie Clotilde Escallier, Henry Ernest Escallier, and

J. C.
1885
ESCALLIER
v.
ESCALLIER.

Jacques Phillip Escallier, the two seventh shares to which they succeeded as co-heirs of Marie Clotilde Escallier in her estate, became divisible in such manner that Louis Ervey Escallier, John Eubert Escallier, James Edward Escallier, and Henriette Ernestine Escallier, and Marie Davies, became entitled each to one-fifth part of such two-seventh shares, and that Lilla and Edith Davies have become entitled to the fifth share of Marie Amélie Davies in equal shares.

(*b.*) Vary the same decree by striking out the declaration relating to election by the appellants, and by James Edward Escallier, and by substituting for it the following declaration:—Declare that Louis Ervey Escallier, James Edward Escallier, and Henriette Ernestine Escallier have elected to take such interests as they are entitled to against the will of their father the testator.

(*c.*) Declare that no ground was shewn at the hearing of the 18th of April, 1882, for directing that Louis Ervey Escallier should up to that date pay interest on the balance of $11,052. 66*c.* found due from him by the judge's certificate, or should pay interest on such further balances as might be found due from him.

(*d.*) Vary the accounts directed by the same decree so far as is necessary for giving effect to the declarations hereby made, and refer the cause to the Supreme Court, to direct such accounts and make such further orders as may be just and proper, having regard to the foregoing declarations.

And that in other respects the said decree should be affirmed.

As the appellants have succeeded in varying the decree, but upon the principal question it has been varied in a way quite opposed to the ground upon which the appeal is based, their Lordships think there should be no costs of the appeal.

Solicitors for appellants, and the respondent, James Edward Escallier: *Mason, Phillips, & Cotton.*

Solicitors for the other respondents: *Wansey & Bowen.*

[PRIVY COUNCIL.]

MARSHALL AND ANOTHER . . . . . DEFENDANTS; J. C.* 1885

AND

MACLURE AND ANOTHER . . . . . PLAINTIFFS. *Feb.* 26, 27; *March* 17.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Construction—Memorandum of Agreement—"His share" equivalent to Share of Firm.

Case in which it was held, that according to the true construction, having regard to all the circumstances of the case, of a memorandum of mutual agreement between M., the plaintiffs, and three other firms, whereby M. agreed to surrender to the plaintiffs "his share" in a certain mortgage held by him as trustee, the share of M.'s firm therein passed, and not merely his own individual share as between himself and his partner.

APPEAL from an order of the Supreme Court (Oct. 9, 1883) sitting in banco for the hearing of equity appeals, and discharging an order of Molesworth, J., the primary judge in Equity (June 15, 1883), whereby the respondents' bill had been dismissed with costs, and ordering the appellant, John Marshall, to execute at the respondents' expense a proper memorandum of discharge of a mortgage to him of the 13th of April, 1878.

The bill sought to establish, under the circumstances stated in the judgment of their Lordships, first, a case of mutual mistake on the part of Marshall and the other parties to an agreement dated the 3rd of March, 1879, with reference to the share in the mortgage thereby agreed to be surrendered by Marshall; secondly, that according to the true construction of the agreement Marshall was bound to surrender the share of his firm in the mortgage and not merely his individual share therein.

Rigby, Q.C., and *E. W. Byrne* (*T. K. Anderson*, with them), contended that by the true construction of the agreement the

* *Present:*—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

J. C. 1885 MARSHALL v. MACLURE.

share of Marshall only and not of his firm was agreed to be surrendered; that such was the true intention of all the parties thereto; that Marshall had no power to surrender his partner's share; and that no case had been made for reforming the agreement on the ground of mutual mistake. Upon this last point *Fowler* v. *Fowler* (1) was cited.

Davey, Q.C., and *S. Dickinson*, for the respondents, contended that by the true construction of the agreement and the intention of the parties the share of Marshall's firm in the mortgage passed. That construction should be adopted which is in conformity with the bankruptcy law of the country, and the firm having been admitted to prove for the whole of their claim must be taken to have intended to relinquish their security. Reference was made to the Insolvency Act of 1865 (28 Vict. No. 273, s. 81, and 34 Vict. No. 379, s. 120). No case had been made out for reforming the agreement.

Rigby, Q.C., replied, referring to 34 Vict. No. 379, sect. 88, and *Ex parte Burrell* (2).

1885 *March* 17.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

In order to make this case intelligible the following facts require to be stated.

Messrs. Maclure & Valantine (the plaintiffs), a firm carrying on business at Melbourne, being indebted to (among others) four other firms, viz.,—

Marshall & Anderson,
Lorimer & Rome,
Martin & McComas,
The Oriental Bank,

executed, on the 13th of April, 1878, a mortgage to Marshall (the defendant) of certain land, for securing payment of £10,000 on the 1st of May, 1878. Marshall on the same day executed a

(1) 4 De G. & J. 250. (2) 1 Ch. D. 537.

deed-poll whereby he declared that one-fourth of that sum was the proper money of his firm, the remaining three-fourths of the other firms above mentioned respectively, and declared himself a trustee for the four firms, and further declared that he would not assign or otherwise vacate the said mortgage, or release the moneys secured until the four firms should be fully paid and satisfied their respective shares.

On the same day the four firms executed an indenture confirming this arrangement.

On the 12th of February, 1879, the following letter was written by Martin to Marshall:—

"We beg to request that you will hold, on account of the Oriental Bank, our interest in the mortgage on Messrs. M'Clure, Valantine, & Co.'s store, which was made in your favour in trust for your firm and Messrs. Lorimer, Rome, & Co. and ourselves, the said bank being holders of promissory notes given by Messrs. M'Clure & Co. to us.

"Yours truly,

"Geo. Martin & Co."

On the 20th of February Marshall received the following letter from the Oriental Bank:—

"Oriental Bank Corporation, Melbourne,

"20th February, 1879.

"Dear Sir,—Referring to the mortgage and other documents relating to Messrs. M'Clure, Valantine, & Co.'s store, which have been in possession of the bank since their execution, I have to inform you that the bank claims, as equitable mortgagees, Messrs. George Martin & Co.'s interest therein, and that the bank have in their possession a request to you from Messrs. George Martin & Co. to hold their interest in the said mortgage and other documents on account of the bank.

"Yours faithfully,

"G. Hamilton Traill, Manager.

"John Marshall, Esq., 1, Queen Street."

Martin became insolvent in March, 1879, and trustees of his estate were appointed. He says that he believes his partner's

J. C. 1885 MARSHALL v. MACLURE.

affairs were liquidated, by arrangement, in London, where that partner resided.

On the 14th of February, 1879, the estate of M'Clure & Co. was placed under sequestration, and on the 24th of February Andrew Lyell and William Couche were elected trustees of their estate under the Bankruptcy Law.

After meetings of creditors had been held, with a view to the arrangement of a dividend, the following document was executed by Anderson & Marshall, Lorimer, Rome, & Co., and a number of other creditors, on the 17th of February, 1879:—

"We, the undersigned creditors, hereby agree to accept a composition of 9*s.* 6*d.* in the pound, on the account of our respective debts, payable by acceptance at two, four, and six months' date, respectively guaranteed to the approval of the trustees and committee of inspection, and we hereby agree to execute a release, when called upon, for the amount of our debts."

The following document was executed on the 27th of February:—

"In the Insolvent Estate of McClure, Valantine, & Co., Melbourne.

"Memorandum of agreement, made the 27th February, 1879, by and between the trustees of the above estate of the first part, John Leslie McClure and David Hood Valantine, trading as McClure, Valantine, & Co., of the second part, and Messrs. Lorimer, Rome, & Co., and Anderson & Marshall, both of Melbourne, of the third part.

"1. The trustees agree to sell, and the said McClure, Valantine, & Co., agree to purchase, all the assets in the above estate for such sum as will pay a dividend of nine shillings and sixpence (9*s.* 6*d.*) per pound on all claims provable on the said estate, together with all costs, preferential claims, and trustees' commission, at the rate of $1\frac{1}{4}$ per cent. upon the total dividends, say £48,000.

"2. The dividend to be payable by the joint and several promissory notes of the parties hereto of the third part to the order

of the said McClure, Valantine, & Co., and indorsed to each creditor at two, four, and six months from 1st March, 1879.

"John Leslie McClure.
"David H. Valentine.
"Andrew Lyell, } Trustees in
"W. W. Couche, } the estate.

"G. Geo. Crispin,
"J. F. Richardson,
"G. Hamilton Trail,
"W. R. Virgoe,
"A. W. Fraser,
} Approved by the Committee of Inspection in the within-named estate.

"Lorimer, Rome, & Co. } Guarantors."
"Anderson & Marshall, }

The following document, on which the questions in the cause depend, was executed on the 3rd of March, 1879:—

"Memorandum of agreement, made by and between John Leslie McClure and David Hood Valantine, trading as McClure, Valantine, & Co., wholesale grocers, of the first part; Lorimer, Rome, & Co., merchants, of the second part; Anderson & Marshall, merchants, of the third part; Lyell & Gowan, accountants, of the fourth part; and John Marshall, merchant, of the fifth part. Whereas the parties hereto of the first part have arranged to re-purchase from the trustees the whole of the assets in their estate for such sum as shall pay dividends of 9*s.* 6*d.* per pound on the debts provable upon the estate, together with all expenses. And whereas the other parties hereto have agreed to associate themselves together in guaranteeing to the creditors the said dividends. And whereas it is desirable that the terms, stipulations, and conditions under which the whole transaction is proposed to be completed should be defined, the parties hereto hereby covenant and agree with each other, as follows, namely:—

"1. That the said McClure, Valantine, & Co. shall re-purchase the whole assets in their estate for such sums as may be required to pay dividends of 9*s.* 6*d.* per pound to each creditor on their estate, together with all expenses, costs, trustees' commission, and preferential claims, the dividends to be payable by the joint

J. C. 1885 MARSHALL v. MACLURE.

and several promissory notes of the parties hereto of the second and third parts to the order of the said McClure, Valantine, & Co., at two, four and six months from 1st March, 1879.

	£	s.	d.
"Debt . .	11,000	0	0
"Extra bills .	3,750	0	0
"Trade claims	1,300	1	2
	£16,050	1	2

"2. That the amount to be ranked by or on behalf of the said Lorimer, Rome & Co. shall be £16,050 1*s.* 2*d.*

"Debt . . .	9,500	0	0
"Extra bills .	4,750	0	0
"Trade account	196	4	3
	£14,446	4	3

"3. That the amount to be ranked by or on behalf of the said Anderson & Marshall shall be £14,446 4*s.* 3*d.*

"4. The said Lorimer, Rome, & Co. shall be entitled to charge a sum of £525 for their guarantee.

"5. In consideration of Anderson & Marshall ranking the full amount of the extra bills in which they are interested, the said John Marshall agrees to surrender to the said McClure, Valantine, & Co. his share in the mortgage held by him as trustee for his firm, Messrs. Lorimer, Rome, & Co., George Martin & Co., and the Oriental Bank.

"6. The said Lyell & Gowan agree to hold the said Anderson & Marshall indemnified from all risk they might incur by signing the promissory notes for the dividends, so that they, the said Lyell & Gowan, will stand in all respects in the same position as if they, and not the said Anderson & Marshall, had originally signed the said promissory notes.

"7. In consideration of the said Lyell & Gowan indemnifying the said Anderson & Marshall, the said John Marshall hereby agrees to share with the said Lyell & Gowan, equally all risk incurred by them under the foregoing clause, so that he will stand in all respects in the same position as if he had originally guaranted ¼ (one-fourth) of the whole risk in conjunction with the said Lorimer, Rome, & Co., and Lyell & Gowan.

"8. The said Lyell and Gowan will be entitled to receive from the said McClure, Valantine, & Co., a sum of £500 for sharing the risk in manner aforesaid.

"9. The said McClure, Valantine, & Co. agree to liquidate the present business under such conditions as the said Lyell & Gowan and Lorimer, Rome, & Co. may decide to impose, and in such manner as may be best calculated to provide funds to meet the dividends when due, and nothing herein contained shall render it incumbent on the said guarantors, or either of them, to make any advances or continue any guarantees for any term beyond 1st September, 1879.

"Melbourne, 3rd March, 1879."

On the same 3rd of March a release was executed by the creditors—among them—by Anderson & Marshall, by John Marshall, by Lorimer & Co., and the trustees of Martin under his insolvency. McClure & Valantine received their discharge on the 30th of August, 1879. On the 2nd of November, 1881, Marshall received the following letter:—

"Notice.

"Melbourne, 2nd November, 1881.

"John Marshall, Esq., Melbourne.

"Dear Sir,—The Oriental Bank Corporation have sold to Mr. James Lorimer all its right, title, and interest in the properties situate in A'Beckett and Little Latrobe Streets, described in a mortgage from John Leslie McClure and David Hood Valantine to you, and entered in the Register Book No. 28,958, a declaration of trust in respect whereof was executed by you; and I have to request that you will hold on account of Mr. Lorimer the bank's interest in the mortgage, or transfer such interest to him.

"Yours truly,

"G. Hamilton Traill."

And the following on the 25th of July, 1882:—

"Melbourne, 25th July, 1882.

"John Marshall, Esq., Melbourne.

"We hereby give you notice that we have disposed of and transferred all our right, title, and interest in the properties in A'Becket Street and Little Latrobe Street, described in a mortgage from John Leslie McClure and David Hood Valantine to John Marshall, and entered in the Register Book No. 28,958, to

J. C. 1885 MARSHALL v. MACLURE.

John Leslie McClure and David Hood Valantine; and we have also transferred to them our right, title, and interest in the moneys secured by the said mortgage; and we request that you will hold, on account of John Leslie McClure and David Hood Valantine, our interest in the mortgage or transfer or release such interest to them as they may desire.

"Yours truly,

"Lorimer, Rome, & Co."

On the 29th of July, 1882, the trustees Lyell and Couche, who had become the registered proprietors of the lands, transferred them to the plaintiffs.

The plaintiffs claiming that, by virtue of the agreement of the 3rd of March, 1879, they were entitled to the share of Anderson & Marshall in one fourth of the mortgage of the 13th of April, 1878, and that, by the subsequent transactions which have been stated, they had acquired the remaining three fourths, applied to Marshall to discharge the mortgage at their expense, and tendered to him a proper memorandum of discharge under the Land Transfer Statute, but he refused to transfer more than his own beneficial interest, as distinguished from that of his firm. He contended that, by the 5th clause of the agreement of the 3rd of March, 1879, he had agreed only to surrender his individual share. Whereupon the plaintiffs brought the present suit, in which they pray,—

"That it may be declared that, by the mutual mistake of the defendant John Marshall, and of the other parties to the agreement of the 3rd day of March, 1879, in the bill set out, the 5th clause of the said agreement was expressed to stipulate for the surrender of the share of the defendant John Marshall, instead of the share of the firm of Anderson & Marshall in the said clause mentioned.

"That the defendant John Marshall may be decreed to execute, at the plaintiffs' expense, a proper memorandum of discharge of the mortgage to him of the 13th day of April, 1878, in the bill mentioned, and to do such other acts, under the Transfer of Land Statute, as may be required for discharging the said mortgage."

Mr. Justice Molesworth, before whom the case came as the

primary judge, dismissed the suit, on the ground that no case had been made out for reforming the agreement in the sense contended for by the plaintiffs.

The full Court, sitting in banco for the hearing of equity appeals, gave judgment for the plaintiffs, ordering Marshall to execute a proper memorandum of discharge, on the ground that, by the true construction of the fifth clause of the agreement, the share of Marshall & Anderson in the mortgage had been agreed to be surrendered.

Their Lordships are of opinion that no case has been made out for reforming the document, and will address themselves solely to its construction. It will therefore be unnecessary to refer to the evidence, except so far as it explains the position of the parties when the document was executed.

The expression "extra bills" in paragraphs 2 and 3 requires explanation.

It appears that Lorimer & Co. and Anderson & Co. had, in consideration of guaranteeing advances from the bank, received promissory notes (called "extra bills") from McClure & Co., being in amount £50 per cent. above the debts guaranteed by them respectively. Thus, the debt of Lorimer & Co. being £11,000, their "extra bills" amounted to £5500; the debt of Anderson & Marshall being £9500, their "extra bills" amounted to £4750. The trustees of the insolvent raised a question (and not unnaturally) on the right of the firms to prove for these "extra bills," whereupon Lorimer & Co. gave up their claim to prove on £1750 worth of their bills, whereas Anderson & Marshall proved on the whole of theirs. It had been argued that this, which appears on the face of the documents, raises some presumption that Anderson & Marshall, being admitted to rank for the whole of their claim, intended to relinquish their share of the mortgage, which turns out to have been a second mortgage, and worth less than half the sum it was intended to secure. It has been further argued that if the document admits of two constructions that should be adopted which is in consonance with rather than in opposition to the bankruptcy law of the colony, and indeed to the general principle of bankruptcy law, viz., that a secured creditor should either deduct the value of his security, and prove for

J. C. 1885 MARSHALL v. MACLURE.

the remainder of his debt, or if he proves for his whole debt, should give up his security.

The further question arises, What was Marshall's "share in the mortgage" as distinguished from that of his firm? It was not a definite or immediately ascertainable quantity, but only what might be coming to him upon the partnership being wound up and its accounts taken. It seems improbable that the parties should have contemplated dealing with so uncertain an interest. But it is said that, by sect. 7, Marshall alone shared the risk with Lyell & Gowan, and agreed to stand in the same position as if he had guaranteed a quarter of the whole risk, in conjunction with Lorimer & Co. and Lyell & Gowan, from which it is inferred that sect. 5 is to be construed with the same limitations as sect. 7.

The answer to this is that the guarantee is a separate transaction, and that clause 7 is expressed unambiguously. Marshall filled three characters:—

1st. That of sole mortgagee and legal owner.

2nd. Of a member of a firm for which he was a trustee.

3rd. A guarantor.

In that portion of the deed which relates to the dividend and to the proof of debts, it is clear he is acting for his firm. In paragraph 7, where he indemnifies Lyell & Gowan, it is clear that he is acting for himself. In paragraph 5, which is the one in dispute, it must be confessed that the wording gives rise to doubt; but their Lordships agree with the Court of Appeal in holding that in this part of the deed also Marshall was acting for his firm, for the following reasons:—First, the expression "share" is more suitable to that definite share in the mortgage which Marshall held on behalf of his firm, than to the indefinite and fluctuating interest which was all that he personally could have in a partnership asset; secondly, the expressed consideration for the surrender of the share was one moving to the firm and not to Marshall separately; thirdly, it is very unlikely that the parties should have intended to leave a fragment of the security outstanding as the separate property of a person who was only a creditor in respect of a joint debt; fourthly, the basis of the transaction was that a certain dividend might be paid "on the

debts provable upon the estate," and it is more likely that parties contracting on such a basis should follow methods in harmony with the general principles on which insolvent estates are administered.

It has been further contended on behalf of the Defendant that it does not sufficiently appear that the share of Martin & McComas had been paid or satisfied in accordance with the last clause of the mortgage, and that the whole interest in it had passed to the plaintiffs so as to entitle them to require Marshall to discharge it. The letter of Martin to Marshall of the 12th of February, 1879, written on behalf of his firm before he became insolvent (he denies that his firm ever became insolvent), directing Marshall to hold the interest of the firm in the mortgage on behalf of the Oriental Bank, together with the notice of the bank to him that they so held it, have been referred to. Martin deposes that neither he nor his firm claimed any interest in the mortgage. No claim of any sort has been preferred by his trustees, who executed the release of the 27th of February, 1879, and it has been shewn how Martin & Co.'s interest passed to the plaintiffs. Their Lordships are not disposed to reverse the judgment on the mere suggestion that by some remote possibility Martin, or Martin & Co., or his trustees (if his estate is still vested in them), might have some claim to an equity of redemption.

For these reasons their Lordships will humbly advise Her Majesty that the judgment appealed against should be affirmed, and the appeal dismissed. The appellants will pay the costs of the appeal.

Solicitor for appellants: *F. Stanley.*
Solicitors for respondents: *Tamplin, Tayler, & Joseph.*

[PRIVY COUNCIL.]

J. C.* 1885 *Feb.* 24, 26; *March* 17.

THE COMMISSIONERS OF FRENCH HOEK PLAINTIFFS;

AND

HUGO . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Roman-Dutch Law—Prescription—User and Enjoyment of Water—Rights of the Owner of Springs—Rights of riparian Proprietors.

The respondent's predecessor in title in 1820 constructed a watercourse on Crown lands, by means of which he diverted the water of two springs which rose thereon, so that they mingled with the waters of a private stream admittedly belonging to the farm, of which the respondent owned a portion. He did so with the license of those who acted as agents for the Government, in order to have the permanent use of the water for his farm, and continued his user for the period of prescription, after which the respondent applied for and obtained from the Colonial Government a renewal of the license originally granted to his predecessor:—

Held, that the user of the diverted water by the respondent's predecessor was not precarious, and that the act of the respondent had not deprived him of the prescriptive right acquired by his predecessor so as to enable the Crown to give to the plaintiffs in 1881 a title to the said water.

It is very doubtful whether, by Dutch-Roman law, the owner of the sources of streams has exclusive dominion over their waters. They are at least subject to rights of user acquired by prescription, and probably also to the rights which English law recognises in riparian proprietors to water flowing in a known or definite channel.

Miner v. *Gilmour* (1) and *Van Breda* v. *Silberbauer* (2) approved.

When a prescriptive right is once acquired, it cannot be lost by any subsequent act not amounting to a surrender, even though such act would have, previous to the acquisition of such right, rendered the user precarious.

APPEAL from a judgment of the Supreme Court (June 29, 1883).

The action was instituted by the appellants for a declaration of their rights in respect of the water of certain springs rising on

* *Present*:—LORD BLACKBURN, SIR BARNES PEACOCK, SIR ROBERT P. COLLIER, SIR RICHARD COUCH, and SIR ARTHUR HOBHOUSE.

(1) 12 Moore's Ind. Ap. Ca. 131. (2) Law Rep. 3 P. C. 84.

Crown lands in the French Hoek Mountains, and flowing on to land within the limits of the municipality of the village of French Hoek by means of certain watercourses, for damages for the wrongful and unlawful entry of the respondent upon the said land and the destruction and injury of the said watercourses, and the diversion of the water from the said watercourses by the respondent, and for an interdict to restrain the respondent from breaking or injuring the said watercourses, and from diverting or in any other way interfering with the said water in the future.

The pleadings and the facts of the case are sufficiently set forth in the judgment of their Lordships.

The judgment of the Supreme Court was unanimously in favour of the respondent, all of the Judges, except Dwyer, J., basing their decision on the ground that the respondent had gained a prescriptive right to the use of the water in dispute, and that he had gained rights as a riparian proprietor. Dwyer, J., was of opinion that there "clearly was no adverse possession" as against the Government on the part of the respondent. He held that the Government had a right to withdraw the permission of the Landdrost and Heemraden; but "they should have restored the stream so diverted to its original channel towards the north and east, and could not make any grant of that stream in derogation of the rights of the riparian proprietors on the north-east side of the mountain (of whom the respondent was one) without the sanction of the legislature."

Reid, Q.C., and *Mackarness*, for the appellants.

Gainsford Bruce, Q.C., and *Elton*, for the respondent.

Mackarness contended that the respondent could only justify his interference with water flowing on the appellants' land by basing his claim to the water upon a right gained either by grant or by prescription. The evidence shewed that the respondent and his predecessor in title claimed under the terms of certain licenses, namely, those granted to the father in 1820 and to the son in 1857. They were merely personal licenses, were subject to revocation, and had been revoked. Both grantees on the evidence acted and regarded themselves as mere licensees; user thereunder

J. C. 1885 COMMISSIONERS OF FRENCH HOEK v. HUGO.

could not evidence an absolute right or lay the foundation of a title by prescription. No absolute rights were granted or thought to be obtained. Both grantees acted and regarded themselves as mere licensees. By Roman-Dutch law the Crown in 1820 was the absolute owner of the water arising from the springs on its lands, that is, to the water of streams which took their source in Crown lands. The Crown had the absolute right to dispose of such water as it pleased. The lower proprietors were bound to receive the water as it flowed down to them; but had no right to such flow as against the owner of the sources. Reference was made to Justinian's Code, bk. iii. tit. 34, sects. 10, 4, and 6; Voet, vol. i. bk. viii. tit. 3, sect. 6, and tit. 4, sect. 14; Burge's Commentaries on Colonial Law, vol. iii. p. 421; Merlin's Répertoire de Jurisprudence, tit. Cours d'eau, vol. iv. p. 42; Touillier, Droit Civil, vol. iii. c. ii. sects. 131–3; Code Civil, art. 641; *Retief* v. *Louw* (1); *Mouton* v. *Van der Merwe* (2); *Van Breda* v. *Silberbauer* (3); *Vermaak* v. *Palmer* (4). With regard to the license, Voet, bk. viii. tit. 2, sect. 2, is an authority to the effect that where there is any doubt whether a servitude has been created by license you are to presume against it, and in favour of the license being revocable; see also Van Leeuwen's Commentaries on Roman-Dutch Law, bk. ii. c. 19, sect. 5. Again, a license of this sort does not pass to a man's heirs: Digest, bk. xliii. tit. 26, sect. 12, and Voet's Commentary thereon, bk. xliii. tit. 26, sect. 3: Digest, bk. viii. tit. 3, sect. 37. The conduct of the respondent was very strong evidence to shew that the user by his predecessor was permissive. Reference was also made to Angell on Watercourses (6th ed.), sect. 213, citing *Perrin* v. *Garfield* (5) and *Tracy* v. *Atherton* (6). As to the powers of the Court of Landdrost and Heemraden, and the capacity in which they were acting when they granted the original license, reference was made to the Ordinance of 1805, as printed in a note to a report of the case in the Court below (7), and *De Wet* v. *Cloete* (8). The license given by that Court could

(1) Buchanan's Reports, 1874, pt. iv. p. 165, 176.
(2) Buchanan, 1876, pt. i. p. 18.
(3) Law Rep. 3 P. C. 99.
(4) Buchanan's Reports, 1876, pp. 32, 33.
(5) 37 Vermont, 304.
(6) 36 Vermont, 503.
(7) 2 Juta's Cape of Good Hope Cases, p. 240.
(8) 1 Menzies, 407.

not be a valid grant, and was therefore revocable at any time: *Wood* v. *Leadbitter* (1).

Reid, Q.C., on the same side, contended that a right to the water in suit as against the owner of the springs could only arise by grant or prescription. Here there was no grant, and the user proved was not of a character to give title by prescription. It could not be said to be nec vi nec clam nec precario. It must be presumed to be precarious unless shewn to be as of right. The user here was under licenses. Since 1855 it was clearly permissive, and no presumption arises that therefore for thirty-five years previously it was as of right. Such a presumption would be inconsistent with every act since 1855, and there is no evidence of adverse possession or user between 1820 and 1855.

Gainsford Bruce, Q.C., and *Elton*, for the respondent, were not called upon.

1885
March 17.

The judgment of their Lordships was delivered by

LORD BLACKBURN:—

This is an appeal by the plaintiffs below against a judgment of the Supreme Court of Good Hope by which "the Court doth grant judgment for the defendant upon the prayer for a declaration of rights in the claim on convention, and absolution from the instance upon the remainder of the declaration, also absolution from the instance upon the claim in reconvention."

There is no appeal on the part of the defendant.

The plaintiffs, in their declaration by the third paragraph, allege that the Government of this colony, on the 28th of November, 1881, vested in the plaintiffs the sole right to use the water of two springs which arise in the French Hoek Mountains on Crown lands adjoining certain municipal lands (that is, the springs marked on a plan, used at the trial, by the letters M and N), and to lead the said water over and from the said Crown lands (referring for their title to a document No. 4), and the plaintiffs are solely entitled to use and lead the said water of the said springs.

(1) 13 W. & M. 843.

J. C. 1885 COMMISSIONERS OF FRENCH HOEK v. HUGO.

The Court in the colony did not think it necessary to decide whether, even on the supposition that the Government of the colony had the power to vest such a right in the plaintiffs, they had effectually done so by the document, and their Lordships do not inquire how this was. It is probable that if the case had been decided in favour of the defendant on such a ground, the result would be that the Government would have made a formal grant, and the whole question would have had to be raised on a future occasion.

By the fourth and fifth paragraphs it is alleged that the plaintiffs had led the said water of the said springs on and into the said village by means of certain watercourses; and that the defendant has, at various times between November and December, 1882, broken and injured the said watercourses, and diverted the said watercourses for his use, and claims a right so to do.

And they claim damages, a declaration of right, and an injunction.

The defendant pleads four pleas. The first plea is as follows:—

"1. He admits the allegations in the first paragraph. He admits that the water in question does rise on Crown lands, but he denies all the other allegations contained in the 2nd, 3rd, 4th, 5th, and 6th paragraphs of the declaration.

"2. The water in dispute, which rests upon the said Crown lands in the French Hoek Mountains, is a perennial stream, and previous to the year 1820 the said water flowed, in a natural and defined channel, from the said Crown lands on to and over certain farms, now called 'Modder Vallei" and 'Amandel Rivier,' and thence into the 'Rivier Zonder End,' and had so flowed from time immemorial.

"3. By a resolution of the Court of Landdrost and Heemraden, dated the 7th of August, 1820, the right was given to one Daniel Hugo, the father of the defendant, and the then owner of the portion of the farm 'Cabriere' now owned by the defendant, and also the then owner of the farm 'Modder Vallei' aforesaid, to divert the said water from its natural channel, and to lead it on to his said farm 'Cabriere' for purposes of irrigation and otherwise, a copy of which resolution is to the said pleas annexed, marked A.

"4. The said Daniel Hugo did thereafter divert the said place of diversion, for a distance of about five miles, over a high ridge in the mountains, and thence over Crown lands and over a piece of land which the said Daniel Hugo was compelled to purchase from one Lotter, in order to convey the said water across it and thence on to the said farm 'Cabriere.'

"5. The said water thereupon flowed in the new channel so constructed, and the whole of the said water was uninterruptedly used and enjoyed by the said Daniel Hugo and by his son, the present defendant, when he became owner of the farm 'Cabriere,' for a period longer than the period of prescription."

It is not necessary to read the second plea. The third plea is as follows:—

"1. He begs leave to refer this Honourable Court to the allegations contained in the 2nd, 3rd, and 4th paragraphs of his first plea.

"2. The water now in dispute has continued to run in the said new channel ever since the construction of the said channel by the said Daniel Hugo in the year 1820.

"3. The said channel has become the natural watercourse of a public perennial stream.

"4. The defendant is a riparian owner of land through which the said stream has flowed since the date aforesaid.

"5. The defendant has not, between the months of November and December, 1882, used more than a reasonable quantity of the water of the said stream, and is entitled, by virtue of the premises, to use a reasonable quantity thereof."

It is not necessary to read the fourth plea.

For a claim in reconvention; the plaintiff in reconvention (defendant in convention) says as follows:—

"1. To avoid prolixity, he asks leave to refer this Honourable Court to all the matters and things in his several pleas set forth.

"2. By virtue of the said matters he is entitled to a reasonable share of the said water flowing in the said new channel across the municipal lands, and across the piece of ground formerly owned by one Lotter, and bought by the said Daniel Hugo, as in the 4th paragraph of the first plea stated, and which land is

J. C. 1885 — COMMISSIONERS OF FRENCH HOEK v. HUGO.

now owned by the defendant, and thence on to the said farm 'Cabriere.'

"3. At divers times during the months of November and December, 1881, and the months of January and February, 1882, and also during the months of November and December, 1882, the defendants in reconvention (plaintiffs in convention) by themselves, their servants or agents, wrongfully appropriated the whole of the said water for municipal purposes and otherwise, and deprived him of a reasonable share or any share of the said water, and diverted the said water from its channel and allowed it to run to waste.

"The plaintiff in reconvention claims:—

"*a.* The sum of £200 as damages for the said wrongful acts of the defendants.

"*b.* An interdict restraining the defendants in reconvention, in their said capacity, from again interfering with or depriving the plaintiff of the use of a reasonable share of the said water.

"*c.* The costs in reconvention."

The Chief Justice of the colony says, quite accurately: "There is no evidence on behalf of the plaintiffs to shew that they have any rights whatever in respect of the churchwarden's furrow, or even that they have a bare possession of or control over the same." so that the averment in the third paragraph of the declaration on which the claim for damages rests is not proved. "And," he proceeds, "on the other hand, there is no evidence on behalf of the defendant to shew that the plaintiffs did at any time appropriate any portion of the water in dispute to municipal purposes," so that the defendant has failed on the averment on which he based his claim in reconvention. Against this the defendant has not appealed.

But this leaves the substantial question: whether the plaintiffs have shewn an exclusive right in the Crown or their grantees to the whole water of those springs against the defendants, undisposed of?

It is convenient now to state the facts appearing on the evidence and documents.

The French Hoek Mountains form a watershed from which several small but perennial streams of water flow to the north-east and south-west. At the foot of these mountains, on the

south-west side, lies the field-cornetcy of French Hoek. The farms "Cabriere" and "La Cotte" are situated within the field-cornetcy of French Hoek on the south-west of the mountains. In the year 1819 the farm "Cabriere" belonged to one P. le Roux, and the farm "La Cotte" to one P. du Toit. Disputes having arisen between them as to their respective rights to some of the streams of water flowing from the French Hoek Mountains over the farm "La Cotte" on to "Cabriere," an action to try their rights was brought before the board of Landdrost and Heemraden of Stellenbosch in 1819, with the result, amongst others, that upon the report of a committee of two of their number, C. J. Briers and F. R. L. Neethling, the watercourse known as the "private stream" was allotted to the owner of "Cabriere," certain other water was allotted to the owner of "La Cotte," and the latter was ordered to pay the costs of suit.

In 1820, Daniel Hugo, now deceased (who was the father of the now defendant, though the relationship seems immaterial), became the owner of Cabriere. Subsequently this farm was divided into three portions. One portion became the property of Johannes Stephanus Hugo in 1846.

Another, it does not clearly appear when, but before 1855, was bought by Stephanus Hauman (a witness called for the plaintiff), and by him sold in erven or village allotments, which now constitute the greater portion of the adjoining villages of French Hoek and Roubaix. The third portion was retained by Daniel Hugo, and was purchased by the now defendant. It is, in respect of this last portion of Cabriere that the prescriptive right to the springs M and N is pleaded in the first plea.

On the division of the farm each portion, when severed from the rest, acquired a right to a portion of the water which naturally flowed down the private stream, which, in 1819, had been allotted to Cabriere. Daniel Hugo retained a portion of that water in respect of that portion of Cabriere which he retained, that has passed to the defendant as the purchaser of that last portion.

There is not any question raised in this cause as to those facts, nor as to what the proportions are in which this natural water has to be divided amongst these different parties.

The action is in respect of the water of two springs, which on

J. C. 1885

COMMISSIONERS OF FRENCH HOEK v. HUGO.

the plan are marked M and N. Those springs rise in Crown land, which is not within the municipal boundary of the municipality since created.

In 1820, the water of those springs flowed in what appears to have been its natural course down on the eastern side of the French Hoek Mountains. It is perfectly clear that at that time the proprietor of Cabriere, on the western side of the mountains had not, as such, any right to the water of these two streams. Nor any right to cut a course in land, whether belonging to the Crown or to subjects, not belonging to him. But there was nothing to prevent his acquiring a right so to do, either by a title actually created by those who had the right, or by user, as of right, nec clam nec vi nec precario, for a period longer than the period of prescription.

A question of considerable general importance was discussed at the bar as to who the persons were who had in 1820 the right to the water.

In *Miner* v. *Gilmour* (1) this Board had to decide as to the Canadian law, which is founded on the old French law, not on that law as altered by the Code Napoléon, and Lord Kingsdown, in delivering the judgment, used at p. 156 expressions which have often been cited, and always with approval. He said:—

"It did not appear that, for the purposes of this case, any material distinction exists between the French and the English law.

"By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided he does not thereby interfere with the rights of other proprieters, either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill or divert the water for the purpose of irrigation. But he has no right to interrupt the regular

(1) 12 Moore, P. C. 131.

flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors and inflicts upon them a sensible injury."

If the rule of Dutch-Roman law which governs the Cape was the same as the rule thus laid down, Daniel Hugo could not lawfully divert the water of those two springs if any riparian proprietor on the eastern side of the mountains would sustain a sensible injury from his so doing. That is to say, that riparian proprietor would have had a right to bring an action against him for so doing, and make him cease to do it. Mr. Mackarness, in an argument which shewed great research on his part, contended that by the Dutch-Roman law the owner of the land in which a fountain arises has the absolute right to dispose of the water in what way he pleases, and that though there is an obligation on the owner of the land below to receive the water which in the course of nature flows down upon him, though it may be a nuisance to him, there is no corresponding right on his side to insist on its continuing to flow down to him if it is a benefit, and that the owner of the land in which the fountain arises may, if it suits his purposes, and if there is no physical obstacle to his doing so, send the water away in another direction, though he thereby leaves the lower riparian proprietor's land below to perish of thirst, unless something has occurred either by actual grant or by prescription to create a servitude in favour of that riparian owner against the owner of the land in which the fountain rises.

In *Van Breda* v. *Silberbaur* (1), it is said by Sir James Colvile, in delivering the judgment of this Board:

"Again their Lordships have not before them the particular texts in Voet upon which all the judges seem to concur in holding that, if the streams do rise in the appellant's land, he is, by the law of the colony entitled to do what he pleases with their waters. Their Lordships are not satisfied that this proposition is true without qualification; or that by the Dutch-Roman law, as by the law of England, the rights of the lower proprietor would not attach upon water which had once flowed beyond the appellant's land in a known or definite channel, even though it had its source within that land."

(1) Law Rep. 3 P. C. 99.

J. C. 1885 COMMISSIONERS OF FRENCH HOEK v. HUGO.

This does not, as was truly said, amount to a decision, for the case was decided on other grounds, but it does amount to an expression of a very grave doubt, whether that which was alleged to be the Dutch-Roman law could be so, the English law as laid down by Lord Kingsdown being so much more convenient. In this doubt, their Lordships in the present case participate.

Mr. Mackarness cited texts from the Civil Law and from commentators which, if the question was now material, their Lordships would have to consider, and would at least probably have requested the respondent's counsel to argue upon them before deciding the point; but their Lordships do not think the point arises. If the riparian owners on the eastern side of the mountains never had any right in the water of those springs, there is no need to consider them at all. If they had any right in 1820, it is undisputed that after the diversion made, as is truly stated in the fourth paragraph, of the first plea, which was more than sixty years since, they have been out of possession; they cannot set up any claim now after sixty years and upwards of possession adverse to them at all events. Moreover, whatever may be the extent of dominion over the water which the Dutch-Roman law attributes to the owners of the sources, it is not disputed that they are subject to rights acquired by prescription; and if such rights have been acquired by the defendant the exact nature of the servient tenement need not be discussed.

Their Lordships do not therefore consider it necessary to hear any further argument on this point.

Daniel Hugo wished to increase the quantity of water in the private stream, which was appropriated in favour of his farm in 1819. He thought, and was right in thinking, that there was no insuperable difficulty in diverting the water of the two springs, so as to make it cease to flow to the east, and cause it to flow to the west, and into the private stream at a point marked X on the plan; but he could not do this without entering upon and cutting up Crown land. And before doing that, he thought it prudent, at least, to apply to the Landdrost and Heemraden to allow him so to do.

A translation into English of the Dutch minutes of the Landdrost and Heemraden forms the document No. 6, which it is

convenient now to read, as a good deal of argument was used as to its terms:—

"Extract from the Minutes of Landdrost and Heemraden at Stellenbosch, held on Monday, the 7th of August, 1820.

"Ordinary Meeting.

"Present, in the morning, the Landdrost Daniel Johannes van Ryneveld, President, and all the Members, &c.

"No. 10. A letter was read from the Field Cornet D. Hugo, acting as such in the French Hoek, dated the 15th of July last, praying that two small watercourses, rising in the French Hoek Mountains, and which at present discharge themselves into the 'Wit Elzebooms Rivier,' may be conducted to his farm, the letter being as follows:—

"To D. J. van Ryneveld, Esq., President, and the Gentlemen Heemraden, of the District of Stellenbosch.

"Hon. Sir and Sirs,—Having observed that two small watercourses rising in the French Hoek Mountains, and which at present discharge themselves into the Wit Elzebooms Rivier, may be diverted and employed for useful purposes, with that object I approach you, praying that it may please your Honours to allow me to divert this water, to be used on my farm, situate in the French Hoek.

"I have the honour to subscribe myself with due respect,

"Your obedient servant,

"1820, the 15th July. D. Hugo."

"The members, C. F. Briers and Fred. Ryk L. Neethling, stated that they had examined into the present prayer last year at the time when the French Hoek road was inspected, and found that it was practicable.

"Having deliberated thereon,

"It was resolved to grant the prayer of the Field-Cornet Hugo, praying that he may be allowed to lead the two small watercourses to his farm, as it is hereby granted, subject, however, to the following condition:—

"That by this diversion no injury is done to the properties or lands of others, or to the public roads, or anything else;

J. C. 1885 COMMISSIONERS OF FRENCH HOEK v. HUGO.

otherwise, in that case, this favourable decision shall immediately cease.

"Extract hereof to be granted to the Field-Cornet Hugo, for his information and guidance.

"Done in the meeting of Landdrost and Heemraden, at Stellenbosch, die et anno ut supra."

There seems to be great doubt as to what was the capacity in which the Landdrost and Heemraden were acting.

They had some judicial functions, but it seems impossible to suppose that they could be acting judicially on this occasion. They had also, under the Ordinance of 1805, very ill-defined powers, and directions to act as a kind of paternal government over the district, and one would say if Daniel Hugo had, without any previous leave, asked, entered on and cut up the Crown lands, it probably would have been right in the Landdrost to ascertain whether what was done was such that the Government ought to take steps to protect its rights. Whether the Landdrost could take steps himself to do so is, perhaps, more doubtful. But there certainly does not appear to be anything in the Ordinance of 1805 to give the Landdrost and Heemraden any power to make grants of the Crown property. And if in 1827, when the Landdrost and Heemraden were abolished, the Government of the colony had sought to resume possession of the land in which Daniel Hugo had cut the watercourse, and to prevent the water from flowing down it any longer, there seems great difficulty in seeing what legal defence Daniel Hugo could then have made. He would have had a grievance in having been allowed to spend money in making the course, and in having been allowed for seven years to lay out his farm of Cabriere in the supposition that he had this addition to the waters of the private stream. This would not amount to a legal answer when the user had been for only seven years. But if the user in this way was for the period of prescription, which at that time was a third part of a century, and those who owned Cabriere, whether Daniel Hugo or those who obtained portions of it from him, had during that time been using the water of these springs, as being as much theirs as the natural waters of the private stream with which they were mingled, the case is quite altered. Unless there is enough to

shew that the user was in its inception precario, that which was at first a defeasible enjoyment would, by lapse of time, acquire the same effect as if it had originally been granted as a servitude by those who had the right so to grant.

This renders it of great importance to ascertain what was the user and enjoyment.

On that there does not seem to their Lordships to be much ground for doubt.

Soon after the 7th of August, 1820, Daniel Hugo did, as is alleged in the first plea, paragraph 4, make the watercourse, and caused the water of the two springs to flow through that course to a point marked X on the plan. There he allowed the water to flow into the private stream and mingle with the natural waters of that stream, and he used the whole for the benefit of his farm. Whether the circumstances under which he made this course were such as to prevent the user of the water in this way being such as to be capable of, after a lapse of sufficient time, maturing into a prescriptive right to continue to use it is a question on which something must be said hereafter; but it does not seem to admit of controversy that the water of the springs was then brought into that watercourse, and flowed and from that time down to the present has flowed down to the point X.

It has not, however, continued down to the present time to flow into the private stream at that point, and there mingle with the natural waters of that private stream.

In 1869 a shoot was made over the private stream, and the water of the two springs, or a great part of it, was carried on that shoot across the private stream and into a furrow made by the churchwardens down to a point marked Y. There, by another shoot, it was carried across the private stream and down to two dams.

The Defendant, as the Chief Justice observes, clearly never, in or after 1869, surrendered his right (whatever it was) to the use of part of that water, if he had acquired a right, nor conveyed it to the churchwardens, and there has not been since 1869 such a lapse of time as would give the churchwardens any prescriptive right to have the water flow in their furrow.

In 1841, whilst Daniel Hugo was still owner of the whole of

J. C. 1885 COMMISSIONERS OF FRENCH HOEK v. HUGO.

Cabriere, he recovered in an action against Abraham Le Roux for breaking a dam which he, Hugo, had made, and depriving him of the use of the stream. No distinction was made, or attempted to be made, between the natural waters of that stream and the waters which at X were mingled with it. The inference seems irresistible that the whole was then used in the same way.

In 1846 John Stephanus Hugo, who was also called as a witness for plaintiffs, bought half of Cabriere, and as purchaser of that half got a right to a portion of the water in the private stream. There is no indication of any distinction having been made between the natural water and the water which flowed into and mingled with it at X.

Some time after that, Hauman, who was called as a witness for the plaintiffs, bought a portion of Cabriere and sold it in erven, with that sale a right to use a portion of the water of the private stream would also pass. There is no indication of any distinction being made between the natural waters and the waters which then mingled with them at X, and so long as the waters were mingled together, that is till 1869, it would be very difficult to make any distinction.

In 1854 the period of a third of a century from 1820 had elapsed. The now defendant purchased from his father, Daniel Hugo, the remaining portion of Cabriere. It was not actually transferred to him till 1858, but on the 22nd of July, 1855, it appears that he had bought it.

On that date the following memorial was sent to the Government:—

"To His Excellency Sir George Grey, K.C.B., Governor and Commander-in-Chief of the Colony of the Cape of Good Hope.

"The Memorial of Jacobus Johannes Hugo, of French Hoek.

"Humbly sheweth,

"That memorialist has become the proprietor of certain farm situated at French Hoek, in the district of the Paarl, called 'Cabriere,' formerly the property of Mr. Daniel Hugo.

"That, on the 7th of August, 1820, the then Landdrost and Heemraden of Stellenbosch granted to the then proprietor, Daniel Hugo, at his request, permission to lead out two small water-

courses, arising in the French Hoek Mountains, and before that discharging themselves in the 'Wit Elzebooms river,' to his said farm, subject to the condition of not in any way thereby damaging the property or lands of other parties, or public roads, or otherwise, according to an Extract Resolution of the Court of the said Landdrost and Heemraden, which memorialist has annexed to this his memorial.

"That memorialist is anxious of having the same privilege extended to him under the like conditions, as being of the greatest importance to the said farm. And therefore prays that it may please your Excellency to grant him the like permission of leading out the said two watercourses.

"And your memorialist, as in duty bound, will ever pray.

"Cape Town, 22nd of June, 1855.

"G. J. de Korte,

"Attorney for J. J. Hugo.

"Referred to the Civil Commissioner, Paarl, for report.

"Colonial Office, 6th of December, 1856."

The following reply (no doubt delayed for the report) was sent:—

"J. J. Hugo, Esq., French Hoek. Colonial Office,
31st December, 1857.

"Sir,—In reply to your memorial of the 22nd of June, 1855, praying for the permission to lead out to your farm two watercourses, rising in the French Hoek Mountains, which was enjoyed by the previous proprietor, I have to acquaint you that His Excellency has been pleased to comply with your request, subject to the conditions that this privilege may be revoked at any time by Government, that private properties or public interests will receive no damage, and that the parsonage and village of French Hoek will be allowed a sufficient supply of water from those streams.

"I have, &c.,

"Rawson W. Rawson."

It is very possible that the defendant, who it appears was a speaker of Dutch, did not understand the documents, which were in English. And even if they had been in Dutch, it is very likely he would not understand them; but their Lordships agree with what is said by the Chief Justice that, "be this as it may,

J. C. 1885 COMMISSIONERS OF FRENCH HOEK v. HUGO.

the acts of his attorney must be taken to be his." And consequently no additional force to the prescriptive title set up against the Government in the pleas can be gained by the user by the defendant himself after 1857; it was precario within the definition given in the Digest, book xliii., tit. 26, De Precario, Law, 1, "Precarium est quod precibus petenti utendum conceditur tamdiu is, qui concessit, patitur." But if a prescriptive right had, as is the opinion of the Chief Justice, been already acquired by Daniel Hugo, from whom the defendant purchased, as early as on the lapse of a third of a century after the water begun to flow to X, which was, apparently, at the end of 1820, or at latest in the beginning of 1821, their Lordships agree with him that the subsequent act of the defendant (unless it amounted to a surrender) could not undo it. Nor is there any ground on which it can be said to estop the defendant from now claiming, as against the Government or the Government's grantee, the right which his predecessor in title had acquired.

It is, however, true that the act of the defendant is evidence, as against him, that the user could not have been such as to confer that title, but their Lordships cannot think it of much weight, especially as (if he had got, de novo, the permission his attorney asked for, in the terms in which he asked for it) it would have enabled him to appropriate the whole of this water, to the exclusion of the owner of the parts of Cabriere previously sold by Daniel Hugo.

The question seems, therefore, reduced to this, whether the circumstances under which Daniel originally made the watercourse to X were such as to prevent a prescriptive title from beginning to run against the Government as owners of the land in which the fountains arise, or as owners of the part of the land in which the watercourse was made. It is not necessary to inquire whether the first plea, which claims the prescription for the defendant as owner of the portion of Cabriere, or the third plea, which puts the prescription as having the effect of putting the stream, which for this period has flowed to X, in the same legal position as if it had always naturally flowed to X, truly represents the law, or whether both may stand as in no way inconsistent. It is enough to support the judgment appealed against if the

plaintiffs have failed to make out a right in either the Government or themselves as grantees of the Government to the whole of the water to the exclusion of the defendant.

It was argued that Daniel Hugo was not in what he did acting as owner of the farm of Cabriere, but only in his personal capacity. To this it seems a sufficient answer to say that all that he asked for in his petition to the Landdrost and all that they assented to was for the use of his farm. It was argued that, assuming the Landdrost and Heemraden to represent the Government as owners of the land, it must be understood, though not expressly said, that it was all revocable at pleasure, and that, therefore, the enjoyment was from the beginning precarious.

A passage from Van Leeuwen's Commentaries, 2nd book, chap. 19, sect. 5, was cited to the effect that all licenses given on request were primâ facie to be considered as revocable at pleasure. Their Lordships, however, think that this must be a question of the construction of the document, and that, in this case, looking at the nature of the request and the express conditions, none of which are alleged to have been infringed, it is impossible to suppose that either Daniel Hugo or the Landdrost and Heemraden supposed that, after the diversion was made, Daniel Hugo could be ejected at the pleasure of either the Landdrost and Heemraden or their principals, if they were agents for the Government as owners of the land. Daniel Hugo thought he was to have a permanent use of the water for his farm, not a precarious user for his farm, still less a mere personal privilege, and whether the Landdrost and Heemraden were acting ultra vires or not the prescription would begin to run as soon as he began to use the water in that way.

This was the opinion of all the judges in the colony except Dwyer, J., who does not give in any detail his reasons.

There Lordships will, therefore, humbly advise Her Majesty to dismiss the appeal. The appellants must pay the costs.

Solicitors for appellants: *Venning, Sons, & Manning.*
Solicitors for respondent: *Flux, Son, & Co.*

[HOUSE OF LORDS.]

H. L. (E.) 1885 *May* 12.

ELIZABETH DOWAGER BARONESS WENLOCK AND OTHERS . . . . . } APPELLANTS;

AND

THE RIVER DEE COMPANY . . . RESPONDENTS.

Corporation—Borrowing Powers—Ultrà vires.

The respondents were constituted a company by an Act of Geo. 2, for the purpose of recovering and preserving the navigation of the River Dee. This Act was amended by subsequent Acts, but none of them expressly authorized or forbade the company to borrow, till the Act 14 & 15 Vict c. lxxxvii., which, by sect. 24, empowered the company to borrow at interest for the purposes of their Acts upon bond or mortgage of the lands recovered and inclosed by them, or partly upon bond and partly upon such mortgage, a sum not exceeding £25,000, and also a further sum, not exceeding £25,000, upon mortgage of their tolls, rates and duties:—

Held, affirming the decision of the Court of Appeal, that whether the earlier Acts gave an implied power to borrow or not, the company was prohibited by the 14 & 15 Vict. c. lxxxvii. from borrowing except in accordance with the provisions of that Act.

By LORD BLACKBURN:—The law laid down by the House of Lords in *Ashbury Company* v. *Riche* (Law Rep. 7 H. L. 653) applies to all companies created by any statute for a particular purpose, and not only to companies created under the Companies Act 1862 (25 & 26 Vict. c. 89).

APPEAL from a judgment of the Court of Appeal (Brett M.R., Cotton and Bowen L.JJ.) setting aside a judgment of Huddleston B. in favour of the appellants (plaintiffs below) in an action tried before him without a jury at the Summer Assizes at Chester in 1882.

The action was brought by the appellants as executors of the late Lord Wenlock deceased to recover a sum of £173,062 11*s.* 11*d.* with interest, alleged to be due from the respondent company in respect of moneys lent to them at various dates between 1870 and 1878 by the late Lord Wenlock, and secured by certain indentures by which the respondents covenanted to repay the same with interest.

The respondents denied that the moneys were received by the company or borrowed for or applied in payment of any debts of or otherwise used for the purposes of the company, and alleged

that at the dates of the several indentures they had no power to borrow, or to bind themselves to pay the moneys thereby expressed to be secured, except to the extent authorized by the local Acts hereafter mentioned.

Huddleston B. gave judgment for the plaintiffs for the whole amount claimed, being of opinion that though the borrowing was ultra vires the company had had the benefit of the moneys and had applied them to the purposes of the company. At the hearing before the Court of Appeal the company admitted the claim of the plaintiffs to the extent of £25,000, and such further sum as they could shew had been applied in payment or discharge of any debts or liabilities of the company.

The Court of Appeal gave judgment for the plaintiffs for £25,000, with interest, and in addition for so much only of the sums advanced as was employed in payment of any debts or liabilities of the company properly payable by them, with interest; the amounts to be inquired into by a special referee. The judgment to be without prejudice to any action the plaintiffs might be advised to bring for enforcing any equities against the stock or shares of the company, or otherwise not expressly adjudicated upon thereby. Against this judgment the plaintiffs now appealed.

By 6 Geo. 2 c. 30 (public Act) Nathaniel Kinderly, his heirs and assigns, and such persons as he, his heirs and assigns, should nominate and appoint under seal, were appointed undertakers of the navigation of the River Dee and were empowered to make and keep the river navigable, and to take and receive certain duties and tonnages.

Nathaniel Kinderly nominated certain persons, who agreed to raise a joint-stock capital of £40,000, and these persons were incorporated by an Act 14 Geo. 2 c. 8 (public Act). Further powers were conferred upon the company by 26 Geo. 2 c. 35 (public Act) and 31 Geo. 3 c. 88 (public Act).

None of these Acts expressly authorized or forbade the company to borrow.

By 14 & 15 Vict. c. lxxxvii. s. 24, the company was authorized to borrow two several sums of £25,000 for the purposes and under the conditions therein mentioned. Sect. 24 is set out in full in the judgment of Lord Blackburn.

H. L. (E.) 1885 BARONESS WENLOCK v. RIVER DEE COMPANY.

By 31 Vict. c. xxv. (local Act) a conditional power was given to raise additional capital, and to borrow on mortgage a further sum of £25,000, but this power was never exercised.

The company expended large sums in and about the improvement of the navigation of the River Dee, and reclaimed a large tract of land of considerable value.

In 1873 Lord Wenlock advanced £85,000 to the company upon a mortgage of lands belonging to them, with the concurrence of all the then stockholders, and in December of the same year he advanced a further sum of £8000 upon a deed of further charge upon the same lands of the company, which was also assented to by all the then stockholders. In June 1878 a mortgage upon lands of the company for £60,000 to the trustees of the Rock Life Assurance Company (dated the 22nd of June 1870 and agreed to by all the then stockholders) was transferred to Lord Wenlock. He died in November 1880, and this action was brought to recover the sums included in these three indentures of mortgage, with arrears of interest.

April 20, 21, 23. *Rigby* Q.C. and *C. H. Anderson* for the appellants:—

The mortgages were under the seal of the company, with the approval of all the then stockholders, and can only be invalidated by shewing that the company had no power to affix its seal to them. The action is not for foreclosure, and the question is not whether the company had power to mortgage, but whether at any time after the 22nd of June 1870, the date of the mortgage to the Rock Assurance Company, the company had power to borrow, which depends on the construction of the Acts. There is nothing in them to take away what it is primâ facie in the power of every corporation to do, namely to borrow. There is no express prohibition in the Acts of Parliament, and the company was incorporated voluntarily for its own convenience, and that being so the corporation has all the powers of an individual except so far as they are taken away expressly or by implication. *Ashbury Company* v. *Riche* (1) applies only to companies created under the Companies Act of 1862. Moreover there the contract was

(1) Law Rep. 7 H. L. 653, 673, 678.

foreign to the purposes of the company, and it was held that there was an express prohibition: see *Attorney-General* v. *Great Eastern Railway Company* (1). Every corporation is entitled to bind itself by its own seal, just as any individual can. If borrowing is not forbidden it is allowed: see per Parke B. in *South Yorkshire Railway Company* v. *Great Northern Railway Company* (2) which has been approved in subsequent cases, such as *Eastern Counties Railway Company* v. *Hawkes* (3); *Shrewsbury and Birmingham Railway Company* v. *London and North Western Railway Company* (4); *Chambers* v. *Manchester and Milford Railway Company* (5); *Taylor* v. *Chichester and Midhurst Railway Company* (6). A statute giving affirmative powers is not to be construed as prohibitory: *Foster's Case* (7). In this case borrowing was within the contemplation of the legislature, for money was wanted from time to time for the operations of the company. The cases in which the power of borrowing is denied are either those of railway companies whose powers are expressly limited by their Acts, or building societies, who may nevertheless give themselves such power by their by-laws. The Acts subsequent to the 14 Geo. 2 do not alter the position. The Acts of 1851 and 1868 are said to take away the power, if it existed under the Act of Geo. 2, but this is not so, they only give special powers to mortgage on favourable terms. The cases under the Municipal Corporations Act 5 & 6 Will. 4 c. 76, such as *Payne* v. *Mayor of Brecon* (8), have only a remote bearing on the point, but they illustrate the principle that granting a liberty is not to be taken as controlling the common law powers. The only question raised by this appeal is as to the borrowing powers. Any other rights of the plaintiffs to recover must be reserved for another action.

H. Davey, Q.C., *Kirby*, and *Clement Higgins*, for the respondents:—

If borrowing had been necessary for the purposes of the corpo-

(1) 5 App. Cas. 473.
(2) 9 Ex. 55, 84.
(3) 5 H. L. C. 331.
(4) 6 H. L. C. 113.
(5) 5 B. & S. 588.
(6) Law Rep. 2 Ex. 356; Law Rep. 4 H. L. 628. [In the judgment of Blackburn J. in this case, Law Rep. 2 Ex. 380, line 28, "form" is a misprint for "forum."]
(7) 11 Rep. 62 b.
(8) 3 H. & N. 572.

H. L. (E). 1885 BARONESS WENLOCK v. RIVER DEE COMPANY.

ration they would have had the power without being expressly authorized by their Act, but that is not the case. The Acts give them no power to borrow. They might perhaps have given a charge on their property, but that is very different: see *Attorney-General* v. *Great Eastern Railway Company* (1); *Colman* v. *Eastern Counties Railway Company* (2); *Brimelow* v. *Murray* (3); *Cunliffe Brooks & Co.* v. *Blackburn Benefit Building Society* (4); *Chambers* v. *Manchester and Milford Railway Company* (5). The money was not advanced to the company nor applied by them for any legitimate purpose. Even supposing the company had an implied borrowing power, that power is limited by the purpose for which it is implied.

Rigby Q.C. in reply:—

The incorporating Act gave an implied power to borrow. The Acts of 1851 and 1868 only concern mortgages, and we stand upon the general borrowing powers. There is no authority applicable to such a case as this.

The House took time for consideration.

May 12. LORD BLACKBURN:—

My Lords, the legislature originally by the 6 Geo. 2 c. 30 made "Nathaniel Kinderly, gentleman, his heirs and assigns, and such persons as the said Nathaniel Kinderly, his heirs or assigns, shall nominate and appoint, undertakers of the navigation of the River Dee." The undertakers were not in that Act in terms made a corporation, and a good deal of argument was based on the supposition that whatever they did under that Act was done by them as individuals, and whatever was given to them by that Act was given to them as individuals. This I very much doubt. I think if the servants of the undertakers had been guilty of some act of negligence, for which their masters were responsible, the person injured might have recovered judgment for damages against the undertakers, and taken in execution the undertakers'

(1) 5 App. Cas. 473.
(2) 10 Beav. 1.
(3) 9 App. Cas. 519.
(4) 9 App. Cas. 857.
(5) 5 B. & S. 588.

goods and lands, but I doubt very much whether he could have enforced judgment by taking Nathaniel Kinderly under a ca. sa., and if the man's person could not be taken, neither could his private goods and lands. In other words I think it at least doubtful whether the undertakers were not made a quasi corporation, a corporation ad hoc; but it is not necessary to form any final opinion as to this. By the 14 Geo. 2 c. 8, after a long recital of who the undertakers were, and the purposes for which they had become undertakers, the then undertakers are "united into one company for the purposes aforesaid, and shall be one body politic and corporate."

There are various Acts, in none of which is anything said in express terms either to give the corporation power to borrow, or to forbid it to borrow, till the 14 & 15 Vict. c. lxxxvii. which received the royal assent on the 24th of July 1851. Up to that time, therefore, I apprehend that the question whether the corporation could, or could not, borrow must, according to what since the decision of *Ashbury Company* v. *Riche* (1) in this House I understand to be the law, depend upon what "the purposes afore said," for which the company were, by statute, incorporated were whether such as to make it reasonable to think that the legislature intended they should have such a power or not.

But the 24th section of the 14 & 15 Vict. c. lxxxvii., is in the following words: "That it shall be lawful for the said company from time to time, as they shall think proper or see occasion, but not further or otherwise, for all or any of the purposes of this or the said recited Acts or any of them, to borrow at interest upon bond, or upon mortgage of the lands already recovered and inclosed or hereafter recovered and inclosed by the said company, or otherwise belonging to them, or partly upon bond and partly upon such mortgage as aforesaid, any sum or sums of money which shall from time to time, by an order or vote of a general court of the said company, be authorized to be borrowed, and which shall not exceed in the whole the sum of twenty-five thousand pounds; and it shall also be lawful for the said company from time to time, as they shall think proper or see occasion, for the purpose of improving the navigation, or for reimbursing to the said company any sum or sums of money that may be due to them upon

(1) Law Rep. 7 H. L. 653.

H. L. (E.)
1885
BARONESS WENLOCK
v.
RIVER DEE COMPANY.
Lord Blackburn.

the toll account, to borrow at interest upon mortgage of the tolls, rates, and duties to be received by the company under the authority of this Act, any sum or sums of money which shall in like manner as aforesaid be authorized to be borrowed, and which shall not exceed a further total sum of twenty-five thousand pounds; and in the event of any part of such money being repaid, the company may again in like manner borrow any sum or sums of money not exceeding the amount of the money repaid, and so toties quoties, but so nevertheless that there shall not be owing upon the security of the said lands so charged as aforesaid at any one and the same time a greater sum than twenty-five thousand pounds, nor upon the security of the said tolls, rates, and duties so charged as aforesaid at any one and the same time a greater sum than twenty-five thousand pounds; provided always that every such mortgage as is hereinbefore authorized to be made shall be subject to the annuities of two hundred pounds and fifty pounds payable respectively to the Hawarden Embankment Trustees, and of two hundred and fifty pounds payable to the Dee Ferry Road Trustees, so long as such annuities or any part thereof shall continue payable."

I can hardly, after reading that enactment, and remembering what had been decided in *Chambers* v. *Manchester and Milford Railway Company* (1), doubt that the legislature did there express an intention that the company should thenceforward have power to borrow £25,000 and no more. There is nothing in the subsequent Act of 1868 (31 Vict. c. xxv.) to shew that the legislature altered that intention. And as all the covenants sued on were executed after 1851, the earliest being in 1870, this alone is sufficient to lead me to affirm the judgment.

It is not necessary to decide anything as to the effect of *Ashbury Company* v. *Riche* (2). The course the argument took makes me think it proper to say—though it is quite true, as Mr. Rigby said, that it was not necessary for the decision in *Ashbury Company* v. *Riche* (2) to do more than decide what the law was with regard to a company formed under the Companies Act of 1862—that I think the law there laid down applies to all companies created by any statute for a particular purpose. I think that if I were to confine the effect of the decision to companies created

(1) 5 B. & S. 588. (2) Law Rep. 7 H. L. 653.

under the Act of 1862, and to say it did not extend to such a corporation as this, I should do wrong. The law is proverbially uncertain. That cannot be helped. But I think I should unjustifiably add to the uncertainty if I set an example of adhering to my previous reasoning (even should I still think it better than that of noble and learned Lords who decided against it) in every case not precisely involving the very same point.

I think *Ashbury Company* v. *Riche* (1) is a binding authority to the extent indicated in *Attorney-General* v. *Great Eastern Railway Company* (2).

I therefore move that the judgment be affirmed, the appellants to pay the costs.

LORD WATSON:—

My Lords, I also am of opinion that the order of the Court of Appeal ought to be affirmed.

I do not think it is necessary, for the purposes of this case, to determine whether, under the provisions of 14 Geo. 2 c. 8, by which they were incorporated, or of the other Acts passed during last century, in relation to their constitution and objects, the respondent company had or had not power to borrow money for the purposes of the statutory undertaking. The Acts in question do not expressly authorize the company to borrow; so that the power, if it existed, must have been derived by implication from their provisions. I am, however, willing to assume that these earlier statutes did give the company an implied authority to borrow, although I am not at present satisfied that such was the case.

The company, in the year 1851, applied for and obtained from Parliament authority to borrow at interest, upon bond or mortgage of their lands, any sum or sums not exceeding £25,000, and also to borrow, to the same amount, upon mortgage of the statutory tolls and rates leviable by them. The 24th section of 14 & 15 Vict. c. lxxxvii., by which that authority is conferred, provides "that it shall be lawful for the said company, from time to time as they shall think proper or see occasion, but not further or otherwise, for all or any of the purposes of this or of the said recited Acts or any of them, to borrow" to the amount thereby

(1) Law Rep. 7 H. L. 653. (2) 5 App. Cas. 473.

H. L. (E.) 1885 BARONESS WENLOCK v. RIVER DEE COMPANY. Lord Watson.

authorized. The said recited Acts include not only all the previous statutes relating to the company, but the earlier Act, 6 Geo. 2 c. 30, which vested in Nathaniel Kinderly, his heirs, assigns, or nominees, the undertaking subsequently transferred to the company by 14 Geo. 2 c. 8. In 1868 the company obtained another Act (31 Vict. c. xxv.) which empowered them to raise, in addition to the sums already authorized, the further sum of £40,000 by the issue of new shares or stock.

The qualification attached by the legislature to the borrowing powers sanctioned by the Act of 1851, was, in my opinion, fatal to the continued existence of any implied power which the company had under their previous statutes. It is unnecessary to consider what might have been the effect of the legislation of 1851 upon the rights of a creditor who, before its date, had lent money to the company; because the earliest of the loans which the appellants are seeking to recover was made in 1870. The provisions of 14 & 15 Vict. c. lxxxvii., s. 24, constitute, if not an express, at least a very plainly implied prohibition against the company exercising for the future, in addition to the powers given by that Act, any power of borrowing derivable by implication from the terms of any previous Act.

Upon that construction of the statutes applicable to the respondent company, I should have been prepared to affirm the judgment of the Court of Appeal, even if I had been satisfied that Mr. Rigby's argument upon the law was well founded. His contention was that the company must be held to possess, as one of the legal incidents of a corporation, the power of borrowing money in furtherance of its statutory objects, unless the Acts which regulate its constitution, either expressly or by implication, prohibit the exercise of the power. I think that such a prohibition is to be found, in this case, in the Act of 1851.

But I cannot assent to the doctrine which was contended for by Mr. Rigby. Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by

reasonable implication from its provisions. That appears to me to be the principle recognised by this House in *Ashbury Company* v. *Riche* (1) and in *Attorney-General* v. *Great Eastern Railway Company* (2).

LORD FITZGERALD :—

My Lords, I concur in the decision which has been announced. The objects for which the respondent company, being a statute corporation, was incorporated must be collected from the statute of incorporation, and the powers of the company taken to be limited to those expressed in the statute or to be properly implied as incident to the purposes for which the corporation was created.

Upon a most careful examination of the incorporating Act (14 Geo. 2 c. 8) and of the amending or enlarging Acts down to the Dee Standard Regulation Act of 1851, I have been unable to satisfy myself that any of them either expressly or by fair implication authorized the company to enter into the engagements the legality of which is questioned in the present action.

It is observable that during the period of 128 years between the incorporating Act and the statute of the Queen passed in 1868, the supposed borrowing powers for which Mr. Rigby contended do not appear to have been exercised.

I do not think that words of prohibition were necessary to limit the powers of the company, but if prohibition were necessary to render the contracts in question illegal we have that prohibition sufficiently expressed in the Acts of 1851 and 1868.

I have come to this conclusion unwillingly, but am not without hope that some means of indemnification may be found to be still open to the appellants.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 12th May 1885.

Solicitors for appellants: *Emmet, Son, & Stubbs, for Leeman, Wilkinson, & Badger, York.*

Solicitors for respondents: *Ashurst, Morris, Crisp, & Co.*

(1) Law Rep. 7 H. L. 653. (2) 5 App. Cas. 473.

[HOUSE OF LORDS.]

H. L. (E.) 1885 May 12.

THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF PORTSMOUTH (acting as the Urban Sanitary Authority of the said Borough) . . . . . } Appellants;

AND

CHARLES BOVILL SMITH, JAMES GOLDSMITH, the younger, AND JOHN BAKER GOLDSMITH . . . } Respondents.

Local Government Acts—Streets—Paving Expenses—Liability of adjoining Owners—Road made good and afterwards paved and flagged—Towns Improvement Clauses Act 1847 (10 *&* 11 *Vict. c.* 34) *s.* 53.

In 1857 a local Act was passed which incorporated sect. 53 of the Towns Improvement Clauses Act 1847 (10 & 11 Vict. c. 34). In 1874 the appellants, in their capacity as the corporation of P., bought some land of the respondents abutting upon a country high road within the district to which the local Act applied, and, in pursuance of an agreement then made with the respondents, at their own expense widened and improved the road and laid out a footpath along the side, and gravelled, channelled, and kerbed the footpath. In 1879 the appellants, in their capacity as the urban authority, paved and flagged the footpath and sought to recover the expense of so doing from the respondents as adjoining owners under the powers of sect. 53. The jury found that before the paving and flagging in 1879 the road was not a street in the popular sense of the term, and that the footpath had been "made good" within sect. 53:—

Held, affirming the decision of the Court of Appeal, that the respondents were not liable, upon the ground that the footpath had been "theretofore made good" within the meaning of sect. 53, but without deciding whether the road was a "street" within the meaning of that section.

The word "theretofore" in sect. 53 refers to the period before the work is done by the commissioners, not to the period before the passing of the special Act.

APPEAL from an order of the Court of Appeal (Brett M.R. Baggallay and Bowen L.JJ.), reversing a decision of Lindley L.J.

The facts are set out in the report of the decision below (1) and in the judgment of Lord Blackburn in this House.

(1) 13 Q. B. D. 184.

April 24, 27. *Bompas* Q.C. and *Pitt Lewis*, for the appellants:—

The road in question was in 1879 a "street" within the meaning of the word as used in sect. 53 of the Towns Improvement Clauses Act 1847. The word in sect. 53, as in all the sections comprised under the heading which precedes sect. 47, is used in the meaning given to it in the interpretation clause. The case of *Robinson* v. *Local Board of Barton Eccles* (1) is no authority against this construction, for there the House did not restrict the meaning of "street," but gave an extensive meaning to "new street," so as to include a street in the legal sense which has been converted into a street in the popular sense.

The above construction is supported by the corresponding clauses of the Public Health Act 1875, viz., ss. 150 and 152. There "street" is used in the larger and more general sense of the interpretation clause, sect. 4, not in the popular sense.

The true effect of sect. 53 of the Towns Improvement Clauses Act 1847 is that the commissioners may exercise their power once at any time. They would naturally delay acting till the street had become such a street (by the building of houses) that it was necessary to pave it. A private owner could not by gravelling the footpath at a time when such gravelling was sufficient, oust the commissioners from their right to flag it afterwards under sect. 53. The words "otherwise made good" cannot extend to gravelling, which would be mere repairs, but must refer to something of a like nature to flagging. If gravelling is a "making good" within the section, then "otherwise made good" should be read as an alternative to "paved and flagged." Upon this construction (which is supported by the Public Health Act 1875 sects. 150, 152), the commissioners might gravel or make good once and might afterwards pave or flag once.

The word "theretofore" in sect. 53, following the words "although a public highway at the passing of the special Act," naturally and grammatically refers to the period before the passing of the special Act; and this construction is confirmed by the other sections.

Arthur Charles Q.C. *E. U. Bullen* and *Bovill Smith* for the respondents were not heard.

(1) 8 App. Cas. 798.

H. L. (E.) 1885 MAYOR, &c., OF PORTSMOUTH v. SMITH.

May 12. LORD BLACKBURN:—

My Lords, this is an appeal against an order made by the Court of Appeal, by which the judgment of Lindley L.J. on further consideration for the plaintiffs was set aside and judgment entered for the defendants with costs instead.

The counsel for the appellants were fully heard at your Lordships' bar; when they concluded it was not convenient at that time to hear the further argument. The further consideration was therefore postponed sine die, and it was at the same time intimated that if the House required to hear further argument notice would be given to counsel.

I have, without calling on the respondents' counsel to argue, come to the conclusion that the order appealed against is right.

There is I think now no controversy on the state of things before 1874.

Milton Lane was in 1857 a country lane being a highway, but in no popular sense of the word a street, and then lying entirely outside the borough of Portsmouth. The site of this lane was included in the ambit of a local Act 20 & 21 Vict. c. xxxvii., called the Landport and Southsea Improvement Act 1857. That Act by the 16th sect. incorporated part of the Towns Improvement Act 1847 (10 & 11 Vict. c. 34), and by the 20th section enacted that in construing the Towns Improvement Act 1847, in connection with that Act, ss. 53, 54, and 73 should be read as if the word "owners" were substituted for "occupiers." Sect. 34 was "Nothing in this Act or in any Act incorporated herewith contained shall empower the commissioners to charge the owners of any land with the expenses of paving, flagging, making, or repairing any footways passing solely through a field or fields." It is not disputed that Milton Lane was not a footpath passing solely through a field or fields, but a highway. I do not think it is material to notice any more of the Landport and Southsea Improvement Act.

In 1874, but not before, some alteration was made in Milton Lane (as to which more must be said hereafter) and its name was then changed to Asylum Road.

The mayor &c., of Portsmouth were in 1864 the local board acting for the borough of Portsmouth, forming a district in which

the Local Government Act 1858 had been adopted. On their petition as to three local Acts, of which the 20 & 21 Vict. c. xxxvii. was one, the Secretary of State made a provisional order, confirmed by the Local Government Supplemental Act 1864 (No. 2). I will now read the material parts of that order: "Now therefore, in pursuance of the powers vested in me by the said Local Government Act, I, as one of Her Majesty's Principal Secretaries of State, do by this provisional order under my hand direct that from and after the passing of any Act of Parliament confirming this order: 1. The said hereinbefore recited local Acts except the parts thereof specified in the schedule hereunto annexed shall be repealed." "5. The provisions of the said hereinbefore recited local Acts not hereby repealed, and of the Acts incorporated in whole or in part with the said hereinbefore recited local Acts or any of them, shall except as hereinafter provided extend to the whole of the said district, and shall be incorporated with the said Local Government Act, and the said local board shall be the commissioners for executing the said Acts; provided that sects. 34 and 35 of the said firstly hereinbefore recited local Act, and sect. 102 of the said secondly hereinbefore recited local Act, and sects. 47 and 50 of the said thirdly hereinbefore recited local Act, shall apply only to the districts to which they respectively applied before the passing of any Act confirming this present order. Given under my hand this eleventh day of June, one thousand eight hundred and sixty four. (Signed), G. Grey. Schedule to which this order refers. The sections to be retained in the hereinbefore recited local Acts are: 3. In the said thirdly hereinbefore recited Act (20 & 21 Vict. c. xxxvii.) the 16th section, in so far as it incorporates the following sections of the Towns Improvement Clauses Act 1847, viz., sects. 53, 98, 147 to 151 (both inclusive), 196, 197, and the section numbered 20 in so far as relates to the interpretation of the 53rd section of the Towns Improvement Clauses Act 1847; 32, 34, 47, 49, 50. So much of sect. 61 as relates to the incorporation of the Waterworks Clauses Act 1847. So much of sect. 84 as relates to abusive language; 85, 86, and 97 except as to the first proviso of the last hereinbefore recited section."

The 53rd section of the Towns Improvement Clauses Act 1847

H. L. (E.) 1885 MAYOR, &c., OF PORTSMOUTH v. SMITH. Lord Blackburn.

was incorporated in the local Act 20 & 21 Vict. c. xxxvii. in 1857, with the slight alteration of "owners" for "occupiers," and that section still remained after the provisional order was in force. It is a common practice in modern Acts to introduce interpretations into Acts. I am old enough to remember when that was a novelty, and, the older draughtsmen said, likely to be a very mischievous novelty. I think that experience has shewn that the older draughtsmen had some reason, but the practice is now inveterate.

In the Towns Improvement Clauses Act 1847, it was enacted (sect. 3): "The following words and expressions in both this and the special Act and any Act incorporated therewith shall have the meanings hereby assigned to them unless there be something in the subject or context repugnant to such construction." "The word 'street' shall extend to and include any road, square, court, alley and thoroughfare within the limits of the special Act."

Milton Lane in 1857, and thence down to 1874, was admittedly not a street in the ordinary and general sense of the word, which has reference to houses, or at least to sites for houses, in some degree of contiguity, but it was both a "road" and a "thoroughfare." In 1874 the mayor, aldermen, and burgesses of Portsmouth, by articles of agreement under seal, bought from the now respondents seventy-five acres of land for the purpose of making a lunatic asylum. These seventy-five acres were bounded on the north by Milton Common Lane, with which as, I understand it, we have nothing to do in this case, and on the south by a public road. This I understand to be that which was then called Milton Lane, and is now called Asylum Road. It was part of the bargain between the corporation and the vendors that "the vendors shall set back the land on the north and south sides of the said roads, so that the same may become and be made of a uniform width of forty feet between the points C. and D. on the north, and the points E. and F. on the south, as shewn on the plan hereinafter referred to, and the expenses of widening and making up the said road shall be borne by the corporation." On reference to the plan, it appears that from E. to F. is a part of Milton Lane, where the land on the north belonged to the vendors. From F.

onwards towards the east, the land on the north of Milton Lane was bought by the corporation to build on it their new asylum.

The bargain was carried out, the vendors set back the land, and the road was widened. On part of the land thus added to the road a footpath was made. All expenses of "making up" the widened road and the footpath were paid by the corporation. This was completed about 1875.

In 1879, three or four years after this was done and paid for by the corporation of Portsmouth in their capacity of purchasers of the land for the purposes of making an asylum, they, in their capacity as urban authority, caused the footway which had been laid down in 1875 to be paved and flagged. This action is brought to recover from the respondents as owners of the land on the north side of Asylum Road the expenses of so doing. The cause came on for trial before Lindley L.J. and a jury, of whom eight had a view. Lindley L.J. reserved the case for further consideration, but took the opinion of the jury on all questions which the counsel on either side contended were, or might be, questions for the jury, reserving to himself, on further consideration, if he thought any of them were questions for the Court, to decide them for himself, and I do not see how any better course could have been pursued.

The road or thoroughfare called Milton Lane was in 1857, and before, a highway. It seems clear that, after some skirmishing, it was admitted that it was a highway repairable by the parish, and consequently, if that be material, after 1857 repairable by the commissioners under sect. 49 of the Towns Improvement Clauses Act 1847, but it was neglected. It was not, in fact, paved or flagged at that time, and indeed the land on which the footway now in question has been made was not then, nor at least till 1875, a part of the road. The portion of the summing-up which I shall now read shews plainly what the questions left to the jury were:—

"Exercising your own judgment, you must consider. Now it is admitted as an important fact that in 1875 the corporation widened this road, and did it under an agreement with the present defendants, and that the expense of making up this road and so on should be made and borne by the corporation, and although

H. L. (E.) 1885 MAYOR, &c., OF PORTSMOUTH v. SMITH. Lord Blackburn.

the agreement with the present defendants does not say anything about the footpaths the mode in which the corporation understood what they were to do in making up the road is shewn by what they did; and we know as a fact that they did make this road, they did metal the carriage-path when they made up the footpath in this way, that they put kerbstones and proper channels, and they made it up, that is to say, they did something to the footpath, they put gravel upon it, and put it in such a way as that it is admitted it was a good gravel-path. That is not denied. Now the question is, whether that is not sufficiently 'otherwise made good;' I confess if it were for me—I do not know that it is for me, but if I had to decide that, and it should be altogether a question of law, I should be of opinion that that was made good. But again I agree that this is rather a question for you than for me. There are the facts. It really depends upon this, 'otherwise made good,' for what purpose? Common sense would suggest it must be for the purpose for which it is used. Bear in mind, now, it is conceded in 1879, and years before, there were no houses on the north side of this lane, and if there is a good gravel footpath I do not see myself that that is not sufficiently good for all the purposes. It may be a question for you or for me, but in order to save further expense, I will ask you these two questions, whether this place was a street in the popular acceptation of the term in 1879, before it was flagged and paved, or was the footpath on the north side sufficiently made good before the corporation dealt with it? Will you be kind enough to answer those two questions, and then I will dispose of the knotty point which may arise in the way I shall be advised. The jury considered. *The Associate*: Gentlemen, are you agreed? *The Foreman*: Quite agreed. *The Associate*: What do you find? *The Foreman*: That it was not a street in the popular sense of the word, and it was otherwise made good."

The judge did not put to the jury any question as to the distinction between the capacity of the corporation in what they did in 1874–75 when building the asylum, and their present capacity as urban authority acting as commissioners under the provisional order. That could hardly be supposed to be a question for a jury.

On further consideration Lindley L.J. expressed himself as

agreeing with all that the jury had found, and, I think, would have given judgment for the defendants but for the construction which he felt obliged to put on the word "theretofore" in the 53rd section. He thought it necessarily must be construed as meaning before the passing of the special Act, that is, in this case, in 1857. And it being quite clear that this footway in question had not been in any sense made good till long after 1857, he gave judgment for the plaintiffs.

Where a single section of an Act of Parliament is introduced into another Act, I think it must be read in the sense which it bore in the original Act from which it is taken, and that consequently it is perfectly legitimate to refer to all the rest of that Act in order to ascertain what the section meant, though those other sections are not incorporated in the new Act. I do not mean that if there was in the original Act a section not incorporated, which came by way of a proviso or exception on that which is incorporated, that should be referred to. But all others, including the interpretation clause, if there be one, may be referred to. It is a dangerous mode of draftsmanship to incorporate a section from a former Act; for unless the draftsman has a much clearer recollection of the whole of the former Act than can always be expected, there is great risk that something may be expressed which was not intended.

I think, therefore, that the clauses 54 and 55, though not incorporated by the order, were properly referred to as throwing light on the 53rd section, which was; and I think also that the interpretation clause (which, I may observe in passing, is not the same as the interpretation of the same word "street" in the Public Health Act, and does not contain the word "highway") was properly referred to.

If I came to the conclusion that on the true construction of the Towns Improvement Clauses Act 1847, the legislature had said that if any road or thoroughfare in the district (even one so thoroughly rural that there was then no pretext for saying that it was in the popular sense of the word a street), although a public highway at the time of the passing of the special Act, that is, in this case 1857, had not before that time, 1857, been well and sufficiently paved, flagged, or otherwise made good, the

H. L. (E.) 1885 MAYOR, &c., OF PORTSMOUTH v. SMITH. Lord Blackburn.

commissioners might at any time (in this case 1879) even though there had been no such change by building of houses or otherwise as to make it now a street (as meaning something more than a mere country road), in their discretion cause it to be paved, flagged, or otherwise made good at the expense of the owners of the land abutting on the road or thoroughfare, I do not see how, as a judge, I could do otherwise than give effect to the expressed intention of the legislature and support the judgment of Lindley, L.J. I might think the legislature improvident and unwise, and that the owners of the land were hardly treated, but I should feel obliged to carry out the expressed intention of the legislature.

There might still be an answer if the commissioners themselves had before 1879 otherwise made good the road, as they would from that time be liable to repair the street. The Master of the Rolls thought that what was done by the corporation of Portsmouth in 1875, in pursuance of the bargain they made in 1874, when buying land on which to build the asylum, would have been illegal unless done by the same corporation in their capacity as urban authority, and that it ought, therefore, to be inferred that they did it in that capacity, and consequently that since 1875 they were bound to keep the street as such in repair.

I am inclined to think that the capacity of the corporation of Portsmouth when purchasing land for the purpose of making an asylum is distinct from their capacity as urban authority; and that what was done in 1875 should have the same effect and no more than if the purchase had been by a county authority for the purpose of making a county asylum. I do not decide this, and go no further than to say that I should not affirm the order on this ground without at least calling on the respondents' counsel to argue in support of this position.

But the case is very different if the true construction of the Towns Improvement Clauses Act 1847 be that at any time when the state of the neighbourhood becomes such as to make it proper to pave, flag, or otherwise make good a road to an extent which would not have been required so long as it was merely a rural highway, the commissioners may, although the road was a highway at the time of the passing of the Act (in this case 1857)

flag, pave, or otherwise make good the road at the expense of the owners of the adjoining land, unless theretofore, that is, before that time, the road had been already well and sufficiently paved, flagged, or otherwise made good. If the finding in this case that the road was not in 1879 a street in the popular sense, is true, I doubt whether the urban sanitary authority could then, under any circumstances, pave the road at the expense of the adjacent landowners, though if they had waited till more houses were built they probably could have done so; but it is not necessary to say how that is.

But if, on the construction of the whole Act, the word "theretofore" in the 53rd section of the Towns Improvement Act 1847 refers not to the time of the passing of the special Act (in this case 1857) but to the time when the commissioners caused such street to be paved and flagged or otherwise made good (in this case 1879), then, on the findings of the jury that the footway had been otherwise made good before 1879, I think the judgment should be for the defendants.

I think there is no doubt that in construing an Act you are to give effect to the intention of the legislature appearing on the whole Act from the words used, and that the words are to be construed in their ordinary grammatical meaning, or, as the Master of the Rolls, perhaps more accurately, says, in their "ordinary idiomatic" meaning. And I think there is a rule of construction commonly expressed thus, that "words of relation refer to the last antecedent." Some subtle remarks on this rule by Lord Bramwell in *Ewing* v. *Ewing* (1) may be perused with interest. I do not think that the "last antecedent" is necessarily the nearest, nor even that the word "antecedent" is confined to what in the collocation of words comes before the word of relation. I think that if the words of this section had been slightly transposed, and, to avoid any difficulty about the interpretation clause, the words of that clause had been used instead of "street," and, abridging it, it had read thus; "If any road have not theretofore been well and sufficiently made good, the commissioners may cause such parts thereof as have not theretofore been well and sufficiently made good to be made good in such manner as they

(1) 8 App. Cas. 831.

H. L. (E.) 1885 MAYOR, &c., OF PORTSMOUTH v. SMITH. Lord Blackburn.

think fit, although the road was a public highway at the passing of the special Act," no one could well have doubted that the grammatical or idiomatic meaning of the words would be to refer "theretofore" to the time when the commissioners acted. That, though coming after the word of relation, would, I think, be an antecedent within the grammatical or idiomatic rule I have referred to.

Baggallay L.J. does not transpose the words, "although a public highway at the passing of the special Act," as I have done, but reads them as if in a parenthesis. The Master of the Rolls seems to say that the rule of idiomatic English that the relative is to refer to the "antecedent" is so strong that though of necessity when there is no antecedent you must make the relative relate to something subsequent, you must not do so if there be anything antecedent to which it can relate. I cannot agree in this.

The cases which were cited do not, I think, give much help. *Robinson* v. *Local Board of Barton Eccles* (1) was on a different Act, and a different clause, and a different interpretation clause. I should say that the great judicial difficulty felt in construing that Act is a strong proof of the soundness of the objection of the old school of draftsmen to the introduction of interpretation clauses.

As I agree with Baggallay L.J. in his interpretation of this Act, I think on that ground that the order appealed against should be affirmed, and the appeal dismissed with costs.

LORD WATSON:—

My Lords, I am of opinion that the order of the 12th of December 1883 must be affirmed although I do not concur in all the reasons which influenced the learned judges of the Court of Appeal.

The jury have found that in 1879, at the time when the appellants executed the operations the cost of which they are seeking to recover from the respondents, the road or lane now known as Asylum Road "was not a street in the popular sense of the word." Upon that finding, the appellants could not recover, if the word

(1) 8 App. Cas. 798.

"street" is used in its popular acceptation in sect. 53 of the Towns Improvement Clauses Act 1847. That section is detached from its group of clauses relating to the paving and maintenance of streets in the Act of 1847, and is incorporated per se with the Portsmouth provisional order of 1864, confirmed by the Local Government Supplemental Act 1864 (No. 2). I agree with the learned judges of the Courts below, that sect. 53 must notwithstanding, for the purposes of this case, be read in the light afforded by the interpretation clause and context of the Act of 1847. There does not appear to be anything in the terms of the provisional order of 1864 which can alter or qualify its original meaning in the statute of 1847. I am unable at present to concur with the learned judges who have held that the word "street," as it occurs in sect. 53, embraces every kind of road or highway which, according to the interpretation clause (sect. 3) it may include. I very much doubt whether it was the intention of the legislature to empower the commissioners to pave and flag mere country roads at the expense of the occupiers (or in the case of Portsmouth the owners) of the adjoining lands. At the same time I think a road might fairly be held to be a street within the meaning of sect. 53 although it did fall somewhat short of the popular idea of a street. If, for instance, a road were laid out as a street, in this sense, that preparations were being made for erecting buildings which on their erection being completed would make it in popular acceptation a street, it rather appears to me that the commissioners would be entitled to deal with the road in virtue of the powers given them by sect. 53. But I have found it unnecessary to form a deliberate judgment upon this part of the case; because I am of opinion that, assuming the appellants to have been warranted in treating Asylum Road in 1879 as a "street" falling under the provisions of sect. 53, the respondents are yet entitled to prevail on other and independent grounds.

The owners of lands abutting on a street, which has been paved by the appellants professedly in terms of sect. 53, have in my opinion, a good defence to any claim made upon them for the cost of paving, if they can shew that, before the work was executed by the appellants, the street had been "well and sufficiently paved and flagged or otherwise made good." The word "theretofore"

H. L. (E.) 1885 MAYOR, &c., OF PORTSMOUTH v. SMITH. Lord Watson.

is, no doubt, capable of receiving two different constructions; it may be held to refer either to the time when the work is executed by the commissioners, or to the time when the special Act was passed. I prefer the construction adopted by Baggallay L.J. I agree with his Lordship that the words "although a public highway at the passing of the special Act" are parenthetical; and in that view it appears to me to be more natural as well as more reasonable to connect the word "theretofore" with the period of the commissioners' operations.

The jury have found that the footpath of Asylum Road, so far at least as the respondents' lands abut upon it, though neither paved nor flagged, had been "otherwise made good" before the appellants proceeded to pave it in 1879. It was proved at the trial that about the year 1874, in the course of widening and making up Asylum Road under an agreement between the respondents and the corporation of Portsmouth, that part of the footpath which is now in question was kerbed, channelled, and made up with gravel. It was maintained for the appellants that your Lordships ought to disregard the finding of the jury in respect that a footpath so constructed could in no circumstances be regarded as "otherwise made good" within the meaning of sect. 53. It was argued that in order to satisfy the statute the footpath must have been formed with wood or asphalte, or some similar material. In short the materials suggested as the only possible equivalents for paving or flagging permitted by the expression "otherwise made good" were all such as are used to form what, in common language, is termed pavement. That cannot in my opinion be the meaning which the legislature intended to convey by that expression. I cannot from my own experience say that a footpath in a street cannot be made sufficiently good for all reasonable purposes by kerbing, channelling, and gravelling; and even if I had to decide the question which was submitted to the jury, I should hesitate to differ from their conclusion.

These appear to me to be sufficient reasons for affirming the order appealed from. I desire to add that if a street has been sufficiently paved, flagged, or otherwise made good before the commissioners proceed to pave, it is immaterial for the purposes

of sect. 53 to consider by whom that may have been done. In the present case the operations, upon which the finding of the jury was based, must, in my opinion, be attributed to the joint action of the respondents and the corporation of Portsmouth. But the corporation appears to me to have acted in the matter as the borough authority under the Lunatic Asylums Act 1853, and as such having interests and duties altogether different from those with which they are charged in their capacity as urban sanitary authority. I cannot therefore assent to the view that the present appellants made good the footpath in or after the year 1874.

LORD FITZGERALD:—

I also, my Lords, am of opinion that the judgment of the Court of Appeal should be affirmed, and for the reasons shortly expressed by Baggallay L.J. The case exhibits remarkably a state of legislation for local purposes so complicated and so difficult to apply as not to be a credit to us, and which no doubt has caused and will continue to cause a great deal of expensive litigation.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 12th May 1885.

Solicitors for appellants: *Williamson Hill & Co., for Alexander Hellard, Portsmouth.*

Solicitors for respondents: *Ford & Ford, for Ford & Sons, Portsmouth.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1885 May 4.

MANN . . . . . APPELLANT;

AND

BRODIE AND ANOTHER . . . . . RESPONDENTS.

Road—Public Right of Way—Prescription—Non-user for a long Period—Presumption—Scotch Law.

According to the law of Scotland, the constitution of a public right of way does not depend upon any legal fiction, but upon the fact of user by the public as matter of right, continuously and without interruption for forty years.

And the amount of user must be such as might have been reasonably expected, if the road in dispute had been an undoubted public highway.

Also, the user must be a user of the whole road as a means of passage from one terminus to the other, and must not be such a user as can be reasonably ascribed either to private servitude rights or to the license of the proprietor.

The continued exclusion of the public from the use of an alleged public road for thirty-seven years will not, per se, destroy a pre-existent right of public way, unless it is maintained for the prescriptive period of forty years, but it is strong evidence that no such public right ever existed.

See Lord Blackburn (pp. 385–6) on the difference of English law.

APPEAL from the First Division of the Court of Session, Scotland.

Andrew Brodie and Malcolm Niel, the respondents, inhabitants of the village of Kilbarchan, Renfrewshire, raised this action against Thomas Mann, the appellant, the proprietor of the estate of Glentyan, situate near the village of Kilbarchan, to have a certain track or road established as a public right of way for all purposes. The alleged road is described as connecting by a bridge over a burn the Bruntshields public road and the Lawmarnock public road. This road runs through ground which is known as the Wardhouse Farm. Wardhouse steading is distance about 370 yards north of the Bruntshields Road, and 220 yards south of the Lawmarnock Road.

About the year 1817 the estate of Glentyan, now extending to 266 acres, but which originally consisted of a house and about sixteen acres of land, was purchased by a Captain Stirling. From time to time, between 1817 and the date of his death in 1872,

Captain Stirling, with a view to the enlargement of his estate, purchased several small farms lying contiguous to Glentyan. The farm of Wardhouse, through which the road in question runs, was purchased by him about 1840; but he had been tenant of it from about 1822 until the date of his purchase. One of the previous tenants of the Wardhouse Farm was a Mr. Stevenson, who about 1805 obtained a lease of it, and remained tenant until 1822. In carrying out his improvements Captain Stirling added Wardhouse to the policy of Glentyan. He built a boundary wall along the Bruntshields Road, and at the end of Wardhouse Road (the road in dispute) erected a gate. The appellant and respondents differ as to when the gate was erected, and also as to whether it was locked, or intended to exclude the public. The respondents contend that the gate was not erected until 1851, and that it never was locked so as to exclude the public before 1874; while the appellant maintains that the gate was erected in 1846, and that the public were effectually excluded from that year. The appellant purchased the estate of Glentyan in 1874 from Captain Stirling's trustees. In 1883 disputes arose between the villagers and the appellant, which resulted in the respondents raising this action for declarator that there is a public right of way along the road in question.

The pursuers averred, inter alia:—

(Con. 3). The farm of Wardhouse was one of those farms purchased by Captain Stirling in 1846. At this time there was in existence, and had been from time immemorial, a road about 500 yards in length and about 14 feet wide leading from Bruntshields public road through the farm of Wardhouse, passing near to the farmhouse or steading of Wardhouse, and then joining the Lawmarnock public road. It was then, and had been so far back as the memory of the oldest inhabitant could carry them, a well formed road, with strong and high hedges or substantial dykes running along its whole course on both sides. From time immemorial, or at least for forty years prior to 1846, there existed a public right of way along the said road, and it had been regularly used by the public of Kilbarchan and neighbourhood and the community generally for the purposes of carting, driving, and riding and walking. (Con. 4). About 1851 Captain Stirling, who was then carrying out considerable improvements on his estate, erected a wooden gate at the entrance to the said road from the Bruntshields public road. The gate was not locked, and a smaller gate or door, which could be opened by any one at pleasure, was placed in it for the convenience of persons walking along the road. (Con. 5). In 1860 a boy was drowned in the dam, which is close to the side of the road, and the

H. L. (Sc.)
1885
MANN
v.
BRODIE.

gate was thereafter locked, but the key was left at the farm steading of Wardhouse, to be used by the public. (Con. 6). The said road formed an easy, expeditious, and convenient road between the villages of Lochwinnoch and Bridge of Weir. By using it people, carts, and other vehicles passed between these places, and others in the neighbourhood were saved a roundabout of about two miles, and they at the same time escaped a steep ascent going in either direction on leaving the village of Kilbarchan. It was a favourite resort of the inhabitants of Kilbarchan for walking.

The defender's averments were, inter alia :—

That the alleged road was made by the tenant of Wardhouse Farm, and was for many years used as a service or estate road by those occupying the farm and the estate of Glentyan. It was required as an accommodation road, as a considerable part of the Wardhouse lands lie to the south of the Bruntshields Road, while the farm steading is to the north of that road. The gate opening into the Bruntshields Road was erected about 1840, and kept locked, and only opened for the convenience of the proprietor, his friends and tenants. The defender and his authors held the estate on a valid, undeniable title, free from any such road or right of way, for more than forty years, and in any event for more than twenty years prior to 1883, and no such right of way has existed, or been claimed or used, during the said period. The public never claimed or exercised, or possessed any right of way in or over the alleged road, or over any part of the defender's estate until the summer of 1883.

A proof was adduced before the Lord Ordinary. Much of the evidence was as to the villagers when boys and girls walking and strolling on the alleged road, and of boys going there for the purpose of fishing in the burn, and in winter for curling. One of the oldest witnesses for the pursuer was Matthew Houston, born in 1793. His evidence was, as far as material, as follows :—

"I remember, when a boy, about ten years old, going up to the burn which crosses the Wardhouse road. There was no bridge across the burn on the Wardhouse road when I first knew it; there was an open ford there. It is not a very big burn, but there are some very deep pools in it. It was shallow where the ford was, and you could go across the burn there quite easily dryshod. There was a road in those days, before the bridge was built, right up past Wardhouse from the Bruntshields road; that road passed the Wardhouse, and ended at the Lawmarnock road." He had seen milk-carts going along the road when he was there.

Cross-examined: He did not remember when the bridge was built or who built it, nor did he see the bridge being erected. The burn ran in a deep hole, where the bridge is, when he first knew it, but it is now filled up. The ford was a little way off. He did not remember Mr. Stevenson being in the Wardhouse Farm. He could not say how often he had seen the milk-carts go through this road.

Mr. Stevenson, born in 1812, now resident in England, a witness for the defender, stated :—

That his father, who was tenant of Wardhouse Farm from about 1805 to 1822, and who died in 1849, told him he had made the road in question. "He told me he could not get access to the Bruntshields Road from Wardhouse until there was a bridge made across the burn. He said he had the road made for the convenience of working the farm. My father did not tell me particularly what he had done in the way of making the bridge, but until the bridge was made the road was useless, because the burn formed a kind of gully, which could not be passed with a loaded cart, or perhaps even with an empty one." His father inclosed the lands so that he might work the farm without gates on the road.

The remaining material part of the evidence will be found fully given in the judgments. On December 3, 1883, the Lord Ordinary (1) pronounced the following interlocutor: "Finds it proved that the defender and his predecessors in title have excluded the public from the use of the road in question since the year 1846, and that there is no proof of the assertion of a right on the part of the public since that year: Finds it not proved that the road in question has been a public road during the period of forty years antecedent to the commencement of the year 1847, and finds that such user as the members of the public have enjoyed during that period has been by tolerance, therefore assoilzies the defender form the conclusions of the action," &c.

The respondents reclaimed, and on the 13th of June, 1884, the First Division (2) delivered the following judgment: "Recall the said interlocutor (of the 3rd of December, 1883): Find it proved that the defender and his predecessors in title have excluded the public from the use of the road in question since the year 1846, and that there is no proof of the assertion of a right on the part of the public since that year: Find it proved that the road in question has been a public road during the period of forty years antecedent to the commencement of the year 1847. Therefore find and declare in terms of the declaratory conclusions of the summons, ordain the defender immediately to remove the walls, locked gates, fences, and all other obstructions erected on the road in question, as concluded for" (3).

(1) Lord M'Laren.
(2) Lord President (Inglis) and Lords Mure and Adam.
(3) 11 Court Sess. Cas. 4th Series, 925.

H. L. (Sc.) 1885 MANN v. BRODIE.

On appeal,

April 14, 15–17. *The Lord Advocate* (*Balfour*, Q.C.), and *Dickson*, for the appellant:—

Both the Lord Ordinary and the judges of the First Division in identical terms found it proved that the appellant and his predecessors had excluded the public from the use of the road since 1846, and that there is no proof of the assertion of a right on the part of the public *since* that year. The judges, therefore, have disbelieved the evidence put forward as to this period, and against this finding there has been no cross-appeal. Such a finding not only negatives a large part of the pursuers' case, but puts upon them the very heavy onus of establishing a right of way, in face of effectual exclusion of the public for thirty-seven years absolutely and completely acquiesced in by them. The finding was also a serious blow to the testimony of the same witnesses as to the period previous to 1846. It lay on the pursuers to prove, from at least 1805–6, the use by the public, and that not merely as a matter of tolerance, but as a matter of right. The evidence of Mr. Stevenson, a person aged seventy-one, and in no way connected with the question, proved that in truth there was no road in 1805, but that his father for the convenience of farming operations subsequently built the bridge and made the road; before this date, the ford was not passable for a loaded cart. Matthew Houston's evidence of the earlier period imported nothing, as he did not say whose were the carts he saw, or where they were going to.

In *Jenkins* v. *Murray*, Lord Deasy said (1): "It is quite plain that if a proprietor has on his property an approach or a path which he requires for his own purposes, and if he allows the public to go on it for any length of time by mere tolerance, that gives them no right." And it was there held that the evidence must shew that the road was used by the public in passing on their ordinary avocations between the two termini; see also *Mackintosh* v. *Moir* (2). The exclusion for thirty-seven years was very strong evidence

(1) 12 July, 1866: 4 Court Sess. Cas. 3rd Series, at p. 1054.

(2) 28 Feb. 1871: 9 Court. Sess Cas. 3rd Series, 574, at p. 576.

against the road being a public way. They also cited *Forbes* v. *Morrison* (1) (2).

Finlay, Q.C., and *James Reid*, for the respondents, were relieved by the House from arguing as to possession of right during the period between 1820 and 1846 :—

There was nothing to account for the road being used as of right in 1820, unless it was that it was a public road from time immemorial. A public right of way, according to the law of Scotland, may be acquired by forty years' possession or use on the part of the public; or from possession from time immemorial. And the latter was held equivalent to forty years although the evidence might fall short of that period. In proving possession as far back as 1820, they were entitled to the presumption that they could have proved antecedent use and possession of a like quality if the witnesses had not died off: *Rodgers* v. *Harvie* (3); *Cuthbertson* v. *Young* (4). But even without the presumption, they had at least six witnesses who could remember a use going back to 1805. They submitted that the evidence of the defender did not prove that the road was originally an accommodation road; but that it was an ancient public road. It was equally reasonable to suppose that the farm steading of Wardhouse was built by the side of the ancient highway, as that the road came to be made afterwards, and in consequence of the erection of the farm

(1) 19 July, 1851: 13 Court Sess. Cas. 2nd Series, 1404.

(2) In *Hill* v. *Ramsey* (House of Lords printed papers, 30th March, 1810), there was from twenty to thirty years of interruption; and it was successfully argued by the proprietor this fact afforded a degree of real evidence which no parole testimony could redargue, that if there was any prior possession at all, it must have been of such a qualified, limited, and precarious nature as could not presuppose, much less create any legal right. As to presumption of like possession retro where no evidence, *Nicolson* v. *Bightie*, 14 Nov. 1662, and *Beatton* v. *Ogilbie*, July 13, 1670, 1 Stair Rep. In the former case the Lords held that any interruption was sufficient to shew, that the other party willed not, nor consented not to the right; and if by such interruptions parties got wrong, it was their own fault, who did not either declare their right, or insist in a molestation debito tempore, or use mutual interruptions. And such presumption of use retro may be re-argued: *Magistrates of Elgin* v. *Robertson*, 24 Court Sess. Cas. 2nd Series, 301.

(3) 8 July, 1828: 3 W. & S. 251.

(4) 1 Macq. 455.

H. L. (Sc.) 1885 MANN v. BRODIE.

steading. The road possessed unusual advantages to the public, it led from one public place to another, it was a short cut, and it avoided steep hills. The Lord Ordinary had given too much weight to the evidence of non-user since 1846, for the respondents submitted that the public were not entirely excluded for thirty-seven years; and the evidence of exclusion, or rather the acquiescence, was explained by good neighbourhood,—Captain Sterling being much beloved. But, in fact, the gate put up in 1846 or 1851 did not in any way affect the extent or nature of the use and possession by the public, inasmuch as that they continued to use the road after that time just as they had done formerly.

After the boy was drowned in 1860, down to 1874, there may have been a certain amount of restriction, but the public continued to use the road as before, at least for foot passengers. They therefore submitted that either the proof of forty years user as of right prior to 1846 was proved, or that there was sufficient evidence of user by the public down to 1874, or at least, 1860, to instruct prescriptive possession.

[They cited also *Wallace* v. *Police Commissioners of Dundee* (1)].

The Lord Advocate, in reply:—

The possession necessary to acquire a public right of way must be for forty years and must be also a full, continuous, and uninterrupted use as of right. These necessary elements were absent in this case.

Time having been taken for consideration, judgment was delivered as follows:

LORD BLACKBURN:—

[His Lordship having read the interlocutory of the Lord Ordinary and that of the First Division, continued:—] The First Division differed from the Lord Ordinary, not as to any question of law, but as to the effect of the evidence.

There was not anything in the nature of the evidence to give the Lord Ordinary, though he heard the witnesses, better means of judging than the judges of the Frst Division or your Lordships, who only read the notes; and the judges, I think, owed it to the respondents to form their own opinion, and to act upon it if it was dif-

(1) 9 March, 18752; Court Sess. Cas. 4th Series, 565.

ferent from that of the Lord Ordinary. I think now that your Lordships owe it to the appellant to form your own opinion and to act upon it, though it is different from that of the Inner House. I need not say that I should not lightly differ from them, even though in so doing I agreed with the Lord Ordinary.

The evidence is voluminous, but there is no difference between the judges below except as to the effect that ought to be given to the evidence relating to the period, I think I may say, between 1805 and 1810, which is directly touched by only a very little of the evidence; and as to the weight to be given to the contrary presumptions arising, one in favour of the pursuers, from the fact, which they all agree is proved by preponderating evidence, that the road was used by the public during a period between 1820 and 1846, affording some reason for acting on slighter evidence during the earlier fourteen years which are required to make up the forty, and one the other way, arising from the fact, which they all agree in finding, that the public have been excluded from 1846, and that there is no proof of the assertion of a right on the part of the public since that year.

Though exclusion for less than forty years will not extinguish a public road which is proved to have been created, the fact of no right having been asserted during an exclusion of so long a period as thirty-seven years affords some reason for requiring more evidence to establish that such a right really existed. There must have been many alive in the period between 1846 and, say, 1856, and now dead, who must have known much more as to what really was the state of user of the road between 1805 and 1820 than those now alive, and if they did not assert a right, it affords some ground for surmising that they did not think that right existed, and, therefore, some ground for looking more critically at the evidence produced to prove that it did.

The case is to be governed by the law of Scotland. Any reference to English law is apt to mislead, unless the difference of the law of the two countries is borne in mind. In both countries a right of public way may be acquired by prescription. In England the common law period of prescription was time immemorial, and any claim by prescription was defeated by proof that the right claimed had originated within the time of legal memory,

H. L. (Sc.) 1885 MANN v. BRODIE. Lord Blackburn.

that is, since A.D. 1189. This was, no doubt, an unreasonably long period. And sometimes, by legal fictions of presumed grants, and in part, by legislation, the period required for prescription as to private rights has, in many cases, been practically cut down to a much shorter definite period (see *Angus* v. *Dalton*) (1). But this has never been done in the case of a public right of way. And it has not been required, though in the way in which the evil of the period of prescription being too long has been avoided, an opposite evil of establishing public rights of way on a very short usurpation has sometimes been incurred.

In *Poole* v. *Huskisson* (2) Baron Parke says: "In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an *intention* to dedicate—there must be an *animus dedicandi*, of which the user by the public is *evidence*, and no more; and a single act of interruption by the owner is of much more weight upon a question of intention, than many acts of enjoyment."

But it has also been held that where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was. It is therefore, I may say, in England never practically necessary to rely on prescription to establish a public way.

Now, it is here to be observed that though the length of time during which a road is used as a public highway is an element in determining whether a dedication should be inferred, it is not any definite time, and a very short period of usurpation will often satisfy a jury. But I am far from thinking that the law of England is here at all the perfection of reason, or such as ought to be introduced into the law of Scotland if not so already.

No case is made here as to a right of way created by the owner, either on the titles or by such acts (if any there be) as without any writing might, according to the law of Scotland, preclude the owner and those who claim under him from denying that a right of way had been created. The sole claim is by prescription, and I

(1) 6 App. Cas. 740, at p. 750. (2) 11 M. & W. 830.

think there is no dispute that, by the law of Scotland, the period of prescription is forty years. If the public had used the road to such an extent and in such a manner that they may properly be said to be possessed of it, and they have had such possession for forty years, they have acquired the right, and that although it was shewn that the owner in fee was, during that time, not dedicating it; but if less than forty years' possession is proved, there is not, as I understand, any principle or authority for saying that a dedication is to be presumed. And again, when the public are excluded for forty years, their right, however clear it may be that they once had one, is gone, by negative prescription. The question, in short, is as to possession by the public or against the public for a period of forty years, and not, as in England, as to user by the public for such an undefined time, and in such a manner and under such circumstances as to justify the inference that an owner in fee had dedicated.

I think that evidence of possession by the public, such as is proved in this case, between 1820 and 1846, would, in England, justify a jury in finding a dedication before 1846; but it does not justify a finding of prescriptive right, unless it is proved that it continued so long, either at the beginning or end of the period, as to amount to forty years.

I do not propose to enter into the evidence in detail. I agree with the judges below that the fair result of the proof is that, in 1842, when Captain Stirling, already the owner of Glentyan, purchased the adjoining farm of Wardhouse and begun to take steps to throw it into his policies, he did exclude the public from a road which they had possessed for some time. I agree, also, in thinking that this exclusion was not complete till the gate was set up across the road.

The appellant's counsel shewed that there was some conflict of testimony as to whether the exclusion was complete from the time the gate was set up, and also as to the time when the gate was put up, some putting it in 1846, some in 1851; but I think the preponderance of proof was that the gate was set up in 1846, and that the exclusion of the public was complete from that time, and not before. That puts the defender in possession, as against the public, for thirty-seven years, but not for forty.

H. L. (Sc.)
1885
MANN
v.
BRODIE.
Lord Blackburn.

The Wardhouse farm lies between two public roads, the northern being called Lawmarnock Road and the southern one the Bruntshields Road. A small stream of water flows across the Wardhouse farm to Glentyan mill, and a dam was made for the mill close by the Bruntshields Road. The farm steading of Wardhouse farm is erected about halfway between the two public roads on the northern or Lawmarnock side of the stream. When all this was done does not appear, but it certainly was some time before the beginning of this century.

The earliest evidence given for the pursuers is that of an old man, Matthew Houston, who was born in 1793, and continued at school till he was eleven years old, that is, till 1804, when he went away to learn weaving. As I understand his evidence, it is not so strong in favour of the respondents as Lord Mure thinks it, but is some evidence in favour of the existence of and the user by the public of the road at this early time. He says he used to go "ginneling" trout in the burn whilst he was a schoolboy, but after he became a weaver was kept closer to his work, and did not go again till he was grown up, and he also used to go to curl in winter and to bathe in summer in the dam. In all those ways he would see the place; how far he would observe, or how accurately recollect what he observed, is a question. I see no reason to doubt that the boy who was ginneling trout would observe, and probably remember, as long as he remembered anything, that on the spot where there is now a bridge over the little stream there was then no bridge, but a deep pool, now silted up; and as the farmer who occupied the steading must have crossed the stream to get to his fields on the south side, I suppose there probably was at that time some kind of ford across the stream. Whether the boy would so accurately observe or remember that ford there may be a doubt. He says, when he next came after he was grown up (I suppose he would hardly call himself so till he was sixteen or seventeen, that is in 1809 or 1810) the bridge was built, but he does not know by whom or when. He says that he saw carts and horses using the road; it is by no means clear whether he means in his schooldays or in his grown up days. But he does say, and I think it very likely, that in the early morning when he and the other boys were waiting to get their breakfasts, and the

milk carts were late in coming, the hungry boys would walk along the Bruntsfields Road to meet them, and he says, "I have seen them on the road in question going past Wardhouse." This is some evidence that light carts, such as milk carts, did come that way before the bridge was built. There is a good deal of evidence that after the bridge was built a number of carts, not very large, but as many as could be reasonably supposed to have an object in going from Lawmarnock Road to Bruntsfields Road, did use the road; but this is, I think, the only direct evidence of such a user before the bridge was built.

Mr. Stevenson, who was tenant of the Wardhouse farm from 1805 to 1823, when he removed to Auchinames in the neighbourhood, built the bridge. He is dead, but his son, who was born in 1812, and cannot of course speak of his own knowledge as to anything happening before 1817 or 1818, is called. He was born at Wardhouse and continued there till they flitted to Auchinames, and there continued to live with his father till his death in 1849, when he succeeded his father in that farm. He tells us, what is very probable, that his father talked to him about what he had done; and as his father is dead that is evidence. It is, of course, subject to the observation that the deceased cannot be cross-examined, and the witness does not say (and probably would not be believed if he did say) that he cross-examined the deceased as to what he told him; but his account of what his father told him is, to my mind, worthy of credit; and without reading what is printed at pages 112 and 113 of the case, I think it strong to shew that before the bridge was built the public could hardly use this road at all, certainly not conveniently, with any except empty or very light carts.

Lord Mure seems to think that because the witness says what, on reflection, is self-evident, that he cannot tell from his own recollection what was the state of the place before the bridge was built, that is, before the witness was born, and cannot tell more from recollection of what his father told him than that he said that until it was made a loaded cart could not cross the ford, this evidence is not so favourable to the appellant's case as I consider it. I do not at all think it conclusive; but when I weigh it against that of Matthew Houston I think it is the more reliable of the two.

H. L. (Sc.)
1885
MANN
v.
BRODIE.
Lord Blackburn.

I agree with Lord Adam that when you find a number of old persons speaking to a certain state of matters, there is a fair presumption that we should have had others, if they had survived, speaking in the same way. But old Mr. Stevenson, if he had survived, would, if his son's recollections are accurate, have spoken very differently from Matthew Houston; who is the only witness who speaks to the state of things before the bridge was built. And Lord Adam lays down very strongly that submission by the public to exclusion for thirty-seven years, though not a bar, throws a heavy onus on those who seek to establish the public use for forty years; yet when the point is brought to be as to what was the state of things in 1807, about the beginning of the forty years (and the evidence is, I think, rather in favour of the defender) Lord Adam seems to give no effect to the onus at all.

I think the Lord Ordinary was right; and as I believe your Lordships are of the same opinion, I move that the appeal be allowed and the interlocutor of the Lord Ordinary restored, the appellant having the expenses in the Court below from the date of the Lord Ordinary's interlocutor, the respondent paying also the costs of this appeal.

LORD WATSON:—

This action was instituted by the respondents in August, 1883, for the purpose of establishing a public right of way for foot passengers, carts, and carriages along a road or track leading northwards from a public road known as the Bruntshields Road, through the appellant's lands of Wardhouse, to another public road known as the Lawmarnock road. The road in dispute, and its termini, are situated in an agricultural district of Renfrewshire, and at no great distance from the village of Kilbarchan.

The respondents sue as members of the public; and the right of road, which they ask the Court to declare, is based, not upon grant or dedication, but upon prescriptive user by the public. In the able arguments addressed to us, from both sides of the Bar, there was really no serious controversy raised in regard to the legal principles applicable to the constitution of a public right of that kind; and, in my opinion, there is little room for controversy on that point. According to the law of Scotland, the constitution of

such a right does not depend upon any legal fiction, but upon the fact of user by the public, as matter of right, continuously and without interruption, for the full period of the long prescription. Lord Stair (1) states prescription to be a rule of "positive law, founded upon utility rather than equity," and he adds (2), that, in Scotland, the common rule is by the course of forty years, "but there must be continued possession free from interruption." According to Erskine (3), "positive prescription is generally defined by our lawyers as the Romans did usucapion, the acquisition of property by the continued possession of the acquirer for such a time as is described by the law to be sufficient for that purpose." These learned writers agree that the definition must be qualified in cases where the law requires an antecedent feudal title as the basis of prescription, as in cases falling under the Act 1617, chap. 12. The effect of prescription, in these cases, is not to constitute the right of the possessor, but to fortify it against all future challenge. But, with the exception of one ingenious author, who says that the possession of the public ought to be ascribed to the jus coronæ (4), no one has suggested that any title is required as the foundation of a prescriptive right of public way. I am aware that there are dicta to be found, in which the prescriptive acquisition of a right of way by the public is attributed to implied grant, acquiescence by the owner of the soil, and so forth; but these appear to me to be mere speculations as to the origin of the rule, and their tendency is to obscure rather than to elucidate its due application to a case like the present.

Although the principles of law which govern the acquisition of a prescriptive right of way are in themselves simple, yet, in their application to facts, questions of nicety frequently arise. It then becomes necessary to consider whether the user has been that of the public, whether it has been continuous and uninterrupted, and whether it has existed for the full period required by law. These are all questions of fact, and it would not be expedient to lay down any specific rules for their solution. As regards the first of these questions, which has occasioned much more controversy than the others, I think it is safe to say generally,

(1) Stair's Inst. 2, 12, 9.
(2) Ibid. 2, 12, 11.
(3) Ersk. Inst. 3, 7, 2.
(4) Napier on Prescriptions, p. 370.

H. L. (Sc.) 1885 MANN v. BRODIE. Lord Watson.

that in order to constitute a public user of the kind of road claimed in the present action, the user must be of the whole road, as a means of passage from the one terminus to the other, and must not be such user as can be reasonably ascribed either to private servitude rights or to the license of the proprietor. Then, as regards the amount of user, that must just be such as might have been reasonably expected if the road in dispute had been an undoubted public highway.

Upon the evidence adduced, the Lord Ordinary and the learned Judges of the First Division have come to the unanimous conclusion that from the year 1846 down to the time when this action was raised, the appellant and his predecessors in title have excluded the public from the road in question, and that there is no proof of the assertion of a right on the part of the public during the whole of that period. With that conclusion I entirely agree; and, after the observations which have been made upon this part of the case by the Lord Ordinary, it would be a waste of time to refer to the evidence in detail. There was, no doubt, some use of the road, prior to the year 1874, by persons unconnected with the lands of Wardhouse; but that use did not amount to the assertion of a public right. Counsel for the respondents endeavoured to press upon your Lordships the consideration that the late Captain Stirling, who was proprietor of Wardhouse from 1844 till his death in December, 1872, was a very popular person, and that, in deference to his feelings, the inhabitants of the district did not assert their right so vigorously as they would otherwise have done. Such considerations are, in my opinion, utterly irrelevant. Public user is a fact which must be inferred from overt acts of possession; and defective evidence of user cannot be strengthened by proof of the motives which induced individuals to abstain from acts of that kind.

The legal consequence of the exclusion of the public from and after the year 1846, is, that the respondents must establish possession on the part of the public for forty years before that date. The Lord Ordinary was of opinion that the respondents have failed to instruct public user before 1846, extending retro for forty years; but the three learned Judges who decided the case in the Inner House took a different view of the evidence. They were of

opinion that the evidence is sufficient to sustain the inference that before their exclusion in 1846 the public had used the road as matter of right for the full prescriptive period.

The evidence of the respondents does, in my opinion, establish that from 1820 to 1846 the public did use the road continuously and as matter of right. That was the view taken by the Lord Ordinary, as well as by the judges of the First Division, and it was not very seriously disputed by the appellant's counsel. It is certainly not proved that the road was used daily, either by foot passengers or by carts, but it is in evidence that it was used in both ways by inhabitants of Kilbarchan, and also by a considerable number of farmers in the neighbourhood, whenever they had occasion. In arriving at that conclusion, I lay aside altogether the evidence as to the road having been used as an access to the mill dam by bathers and curlers, and I attach little weight to the evidence that people used to stroll along part of the road, although such evidence is not altogether devoid of significance when it is coupled with proof of public use of the road throughout its entire length.

The main controversy between the parties related to the condition and use of the road in question during the period antecedent to the year 1820. The respondents have adduced oral testimony of living witnesses, which reaches back as far as the year 1803. The appellant has also led proof which goes back to the year 1805, but that proof consists of the hearsay testimony of a single witness, Stevenson, whose information was derived from his deceased father, who was tenant of the lands of Wardhouse from 1805 until 1823. It seems to be fairly deducible from the evidence on both sides that about the year 1806 a bridge was built by the late Mr. Stevenson, at that time the new tenant of Wardhouse, in order to carry the road in question over a burn which it crosses, between the steading of Wardhouse and the Bruntshields Road. I think it is also proved that a road existed before the bridge was built, and that it previously crossed the burn by means of a ford, a little way further down the burn than the site of the bridge. The condition of that part of the road before 1806 is a matter of some importance, and upon that point I can see no reason for rejecting the testimony of the witness Stevenson, who says that it could not be used by

H. L. (Sc.) 1885 MANN v. BRODIE. Lord Watson.

loaded carts. To my mind, it is extremely improbable that an agricultural tenant would have incurred the expense of erecting a bridge, if the ford and its accesses had not been very unsuitable for ordinary farm traffic. It is also, in my opinion, matter for observation that it is neither proved nor suggested that, at the time when the bridge was built, the road at that point had fallen into temporary disrepair, or that its bad condition was due to other than permanent causes.

I shall now refer to the evidence of possession anterior to 1820. There are six aged witnesses for the respondents, whose combined testimony covers the period from 1803 to 1820, and I begin with those whose recollections are the most recent. William Orr, who was born in 1805, speaks to the use of the road from 1815 by carts from his father's farms of Law and Lawmarnock, and also from two other farms in the vicinity, Pannell and Monkland. He also speaks to the use of the road by persons on foot, but it is by no means clear that his evidence on that point applies to the earlier years between 1815 and 1820. John Gilmour, born in 1802, first saw the road in 1814. When he was a boy he used the road almost daily in the summer time, when he went to bathe in the dam; and he likewise states that he has seen horses and carts using the road, but cannot say whose horses and carts they were. He does not speak to the use of the road by foot-passengers at that early period. James Clark, born in 1802, who recollects the road since 1811 or 1812, says that "in these early days the road in question was very much used by the Kilbarchan people for walking. I went from end to end of the road." He seems to have used the road at that time as an access to the dam, when he went with other boys to bathe, and he says that he has seen carts upon the road, but cannot say whose they were. Archibald Hunter, born in 1803, was first taken to the road about 1808 or 1809, when he was a mere child, by his father, who, on that occasion, went from the Bruntshields Road, a little way up the road in dispute, and then "turned and came away back again." I think it is the import of his evidence that he did not renew his acquaintance with the road until he was a "young lad," whatever that may signify; probably not before 1814 or 1815. He too went at that time for the purpose of bathing in the dam, but he says that the road was a great resort of the

Kilbarchan people, and that he has seen horses and carts going along the road, but cannot say whose they were, as he "did not pay any attention."

The two remaining witnesses for the respondents who had the earliest acquaintance with the road, and upon whose evidence great reliance was placed by Lords Mure and Adam, are Matthew Houston and John Houston. Matthew Houston was born in 1793, and his first knowledge of the road was acquired in 1803 and 1804, when he went to "ginnel" trout in the burn over which the bridge was subsequently built. He left school and began to weave when he was eleven years old, and it plainly appears from his evidence that from that time until he was a "young man" his knowledge of the road was very limited, if indeed he was ever upon it, which is by no means clear. Accordingly he knows nothing about the building of the bridge, save that he saw it after it was built, and he was not even aware that Mr. Stevenson was the tenant of Wardhouse. It is very difficult to ascertain the date at which he first saw the bridge, but, in all probability, it cannot have been before 1809 or 1810. The only occasion of his using the road in his younger days was in going to catch trout, with his hands at first, and afterwards with rod and line, and going to see the curlers on the dam. He does give evidence to the effect that the Kilbarchan people were in the habit of walking along the road; but I do not think that evidence, when closely examined, can be held to refer to the years 1803 and 1804. Then he speaks to the existence of the road and ford in these years, and he adds that the road was "always passable for carts." I believe that statement to be true, subject to the qualification (which it does not exclude) that the ford and its accesses did not afford a convenient passage for carts, and were not passable by a loaded cart. But I doubt very much whether his evidence as to the use of the road by carts is in reality applicable to the years 1803 and 1804. One thing is plain, that even if it be held to apply to these two years, his evidence at that time is limited to milk carts, which supplied a dealer in Kilbarchan.

Then John Houston, who was born in 1799, first went on the road in 1807, and frequently used it afterwards, on his way to the

H. L. (Sc.) 1885 MANN v. BRODIE. Lord Watson.

dam for the purpose of bathing or sliding. He says nothing whatever about the use of the road by other persons on foot, except for these purposes, and he says expressly, "I don't remember seeing carts on the road." This witness, on cross-examination, made a volunteer statement to the effect that "the carts went through the burn until the bridge was built." The statement is not evidence at all. The witness never saw the road before the bridge was built, and he cannot recollect his having seen a single cart upon it after the bridge was built. He does not say at what time, or from whom, he obtained his information, and in the absence of any evidence on these points his hearsay statement is inadmissible.

In my opinion the evidence of these old men, taken by itself, and apart from any presumption which might be derived from other facts proved in the case, would be quite insufficient to establish that the road in question was used as matter of right by the public from 1806 down to 1820. I agree with the Lord Ordinary that the oral evidence applicable to that period "falls very far short of what would be necessary to establish a public right of way," and that it does not prove any use of the road, by members of the public, "except such as may be predicated of any of the ordinary farm roads made and maintained by proprietors throughout the country." If I understand his judgment aright, Lord Mure, though he does refer at some length to the case of *Harvie* v. *Rodgers* (1) was of opinion that the direct oral evidence was sufficient, without the aid of any presumption, to establish public user during that earlier period. Lord Adam does not appear to me to have taken the same view, because he says, "I ask myself what is the presumption which we must draw when all the survivors speak in one direction. I think there is this presumption, that if we had had more survivors they would all have spoken in the same direction." His Lordship then refers to a direction of the Lord Justice Clerk (Hope), which was upheld by this House in *Cuthbertson* v. *Young* (2), and goes on to say, "That charge of the Lord Justice Clerk (Hope) is an authority in the direction I have already indicated, and if there is evidence, uncon-

(1) 3 Wil. & S. 251. (2) 1 Macq. 455.

tradicted and undisputed, going back to an early period, I think we are entitled to have recourse to the presumption that there was an antecedent grant."

In *Harvie* v. *Rodgers* (1) and *Cuthbertson* v. *Young* (2), both of which came to this House upon a bill of exceptions to the charge of the presiding judge, there is no reference made by the noble Lords who decided these cases to any presumption of an antecedent grant. In *Harvie* v. *Rodgers* (1) there was evidence before the jury to the effect that, for at least thirty-four years prior to 1789, the public had enjoyed the free and uninterrupted use of the footpath in question; and that from 1789 to 1822, when the action was brought, the public continued to use it, notwithstanding repeated but unsuccessful attempts to bar their passage. Lord Lyndhurst thus states the import of the direction excepted to. "The learned judge in substance told the jury, There is evidence from which you may assume that for a particular period, namely forty years, this way had been exercised without interruption. If you are of that opinion, then that is, according to the law of Scotland, sufficient to establish a prescriptive right of way; and if that right of way be once established in the manner I have stated, then I tell you that in point of law subsequent interruptions not acquiesced in cannot defeat the right so acquired." In expressing his approval of that direction the noble and learned Lord said that if thirty-four years of uninterrupted exercise of the right of way were established, "it was then competent for the jury to presume, *and they ought in point of law to be directed to presume*, a previous enjoyment of the same kind."

In *Cuthbertson* v. *Young* (3) there was evidence to shew that between 1827 and the raising of the action in 1849, a period of twenty-two years, the public had been excluded from the footpath claimed. The Lord Justice Clerk (Hope) refused to tell the jury that such evidence of interruption was "sufficient in law to exclude such right of way on the part of the public," and he directed the jury that, "if evidence was given satisfactory to their minds of the existence of a public footpath as far back as

(1) 3 Wil. & S. 251, at p. 260.
(2) 1 Macq. 455.
(3) 1 Macq. 455; 14 Court Sess. Cas. 2nd Series, 300, at pp. 306, 307.

H. L. (Sc.) 1885 MANN v. BRODIE. Lord Watson.

the memory of living witnesses could be expected to extend, although such testimony did not either in any instance, or only in a few cases, go distinctly as far back as forty years prior to 1827, still it was competent for the jury to presume, and (the evidence being consistent and uncontradicted) the jury *ought in point of law to presume* a previous enjoyment corresponding with the manner in which it had been enjoyed during the period embraced by the evidence." In affirming that direction the Lord Chancellor (Cranworth) (1) added, "I understand the learned judge, when he used the expression '*the jury ought to presume*,' not to be stating a proposition in law on which the jury were bound to act, but merely to be pointing out what was an almost irresistible inference in point of fact." The expression was borrowed verbatim by the Lord Justice Clerk from the judgment of Lord Lyndhurst in *Harvie* v. *Rodgers* (2); yet it elicited from Lord Cranworth the observation that Scotch judges are "sometimes perhaps a little loose in their mode of directing juries."

There can, I apprehend, be little doubt that Lord Cranworth was right in pointing out that any presumption which the jury were entitled or ought to draw was matter not of law but of fact. The decisions of the House in these two cases go no further than this, that when there is no evidence, or it may be scant evidence, applicable to the commencement of the forty years requisite, the Court or a jury may nevertheless infer, if the evidence is sufficient to sustain the inference, that the public user which is proved to have existed during the later portion of that period must have existed throughout. But these decisions afford no indication whatever of the quantum of evidence which will be sufficient to support such an inference. The House assumed, and was bound to assume, that there was ample evidence to support the inferences drawn by the jury, for in *Harvie* v. *Rodgers* (2) the Court had refused a motion made for a new trial on the ground that the verdict was against the weight of evidence, and in *Cuthbertson* v. *Young* (1) the verdict had never been impeached on that ground.

In the present case there is evidence applicable to the first

(1) 1 Macq. 455, at p. 460; 14 Court Sess. Cas. 2nd Series, 300.
(2) 3 Wil. & S. 241.

fourteen years of the prospective period during which the respondents must establish public user. To my mind the evidence which applies to these earlier years is deficient not only in amount but in quality. If twenty witnesses had merely repeated the statements made by the six old men who gave evidence for the respondents that would not, in my opinion, have strengthened the respondents' case. On the other hand the testimony of a smaller number of witnesses each speaking to persons using and occasions of user other than those observed by these six witnesses, might have been a very material addition to the evidence for the respondents. It is however a just observation that it would not be reasonable to expect that many witnesses could be found capable of speaking to the condition of the road in question and its use during the period of fourteen years ending in 1820, a period ranging from sixty-three to seventy-seven years before proof was taken in this case. The evidence suggests, and it is doubtless the fact, that before this case went to proof the vast majority of those who were qualified to speak to that period of fourteen years had paid the last debt of nature. And I freely concede that in ordinary circumstances that fact might afford reasonable grounds for presuming that the testimony of those witnesses whom death has silenced would have amply supplemented the evidence of the survivors.

But the circumstances of the present case appear to me to be exceptional. For thirty-seven years before the respondents brought their action the public were excluded from the road and never asserted their right to use it. Whatever might have been the case before that date, the proprietors of Wardhouse, by the lapse of seven years from 1846, became entitled in 1853 to a possessory judgment, and thereafter they had no occasion to establish their exclusive right to the road by declarator. It lay with the public to establish their right by judicial decree before they could legally use the road. But that is not the only effect which must be attributed to the exclusion of the public for so long a period as thirty-seven years. The fact of exclusion will not, per se, destroy a pre-existent right of public way, unless it is maintained for the prescriptive period of forty years; but it

H. L. (Sc.) 1885 MANN v. BRODIE. Lord Watson.

is, as stated by Lord Cranworth in *Cuthbertson* v. *Young* (1), evidence that no public right ever existed, which may, of course, be met and overcome by counter evidence. Lord Adam was of opinion that the exclusive possession of the proprietor for thirty-seven years threw a very heavy onus on the respondents; and he adds that "if, in spite of that onus, the pursuers have been able to make out, by proof of use over the whole period of forty years, or upon a presumption arising from proof of use over a lengthened part of that period, that the road was used or enjoyed as a public road for that period, that will be sufficient." So far as it goes I see no reason to differ from that statement; but it appears to me to omit all notice of the most important question which arises in the circumstances of this case, namely, to what extent the presumption to which his Lordship refers is ousted by the fact that there was no assertion of any right by the public for a period only three years short of what was necessary to place the appellant's right to the road beyond question. And I do not find that, in dealing with the evidence, his Lordship entertains that question, or considers the weight which that fact of exclusion ought to have against the presumption which he draws in favour of the respondents.

The Lord Ordinary, in his opinion (2), speaks of "the origin of the road"; and it appears to me that the meaning which his Lordship intended to convey by that phrase has been misapprehended in the Inner House. The Lord Ordinary did not, in my opinion, mean to suggest that there was no road or track along the line now claimed before 1806, but that before the erection of the bridge in that year there was merely a bad farm road, quite unsuitable for the purposes for which the public used the road with carts between 1820 and 1846. And it is a significant fact that those members of the public who used the road with carts between 1820 and 1846 did so mainly because its gradients were more suitable for a loaded cart than those of the neighbouring highways, whereas, prior to the erection of the bridge in 1806, the road was unavailable for such traffic. I also venture to think that Lord Mure has misapprehended the evidence of Mr. Stevenson

(1) 1 Macq. at p. 459. (2) 11 Court Sess. Cas. 4th Series, 925.

as to his father's complaints that the public used the road. His Lordship seems to infer from that evidence that, throughout the term of his father's tenancy, the public used the road as matter of right. What the witness Stevenson does say is: "My father complained of people who took advantage of the road that he had made. It was done in some cases but very rarely." The statements of the witness obviously refer to a use which did not begin until after the bridge was erected, and moreover, on any fair construction of them, they relate to actual complaints made at the time in the hearing of a witness who was born in 1812.

The impression made upon my mind by the evidence applicable to the period between 1806 and 1820 is, that it is quite possible, if not probable, that the appellant has, by the lapse of time, been deprived of as much evidence as the respondents. It is nowhere suggested that a single person who lived upon the farm of Wardhouse between 1805 and 1820, and who must have known, better than any of the aged worthies who have been examined for the respondents, the condition of the road and its uses before and after the erection of the bridge, was alive at the time the proof was taken in this case. That loss of testimony is plainly not imputable to the appellant, and I know of no principle, and can see no good reason for holding, that the public ought, any more than a private litigant, to be exempted from the consequences of their own laches in delaying the judicial assertion of their rights.

In these circumstances, I am very clearly of opinion that the exclusive and undisturbed possession, enjoyed for thirty-seven years by the appellant and his predecessors in title, is absolutely fatal to any presumption of public user prior to the year 1820; and, seeing that the evidence of possession before that date is insufficient of itself, and without the aid of presumption, to instruct user by the public, I have come to the conclusion that the interlocutor appealed from ought to be reversed, and the judgment of the Lord Ordinary restored.

LORD FITZGERALD:—

The statement of the law made by my noble and learned friends has been so very clear and satisfactory that I shall not attempt to add one word to it. By "the law" I mean the law of Scotland

H. L. (Sc.)
1885
MANN
v.
BRODIE.
Lord FitzGerald.

as applicable to the particular case now before us. It differs very much from the English law upon the same subject, but still more from the law of Ireland, which is so clear and simple that a question such as is now before your Lordships could not possibly have arisen.

Having disposed of the legal question, the remaining question is, what is the correct view to take of the evidence in the case, or what legitimate inference is to be drawn from the facts unquestioned and in proof of the case? When, from reading the judgment of the Lord Ordinary and the judgments of the Appellate Court in Scotland, I had learned that there was no real controversy upon the fact that for thirty-seven years before the bringing of this action the public had been excluded from this road, and excluded in a clear and unequivocal manner, and that such exclusion had been continuous; it did appear to me that there was an inference to be drawn so overwhelming against the claim of the pursuers that it would be difficult indeed to rebut that inference.

Now let us go back to the year 1846, when Captain Stirling the owner of Glentyan had acquired the Wardhouse estate. He himself, we may take it, knowing a great deal of the local circumstances connected with the enjoyment of this road before that time, whatever enjoyment there was, proceeds to deal with this road for the purpose of enlarging and completing his policies, and he does it in a most expressive and decided manner, namely, by closing up this road, putting across it a gate which is constantly kept locked or secured, and absolutely excluding the public. He was dealing with the community of Kilbarchan. The act which he was doing was one which was against the interest of every member of that community; it was one to which they would all be adverse; and he was dealing with a community that was quite capable of asserting and defending its own rights. I should come to the conclusion that they would then have asserted the right if a public right of way had existed.

There is another view also to be taken. That was in 1846. At that time a large portion of the community could have spoken to the enjoyment for forty years previously, if enjoyment there had been. If there had been continuous and exclusive possession by the public, there were then a number of people who could

have spoken to it in positive terms and in the most satisfactory manner; and it seems to me incredible that a community who saw its right, if the right existed, violently invaded, would have long submitted to that invasion and have acquiesced in it for thirty-seven years. The inference to be drawn from that is very strong that a public right did not exist, and that the people then living knew that it did not exist, and that it was because of that knowledge that the community acquiesced in the forcible act of Captain Stirling in excluding them. Well, if that is the true view to take of it, it only remains to consider whether in this case there is sufficient evidence of facts in proof to rebut that legitimate and, as I have called it, overwhelming inference.

I do not intend to advert to any of the details. They have been so well criticised by my noble and learned friends who have preceded me that I should only be wasting time by entering upon them. I will only state what occurs to my own mind regarding them, and that is that at an early period, from 1805 to 1820, the evidence is of that character that it cannot be said to be such full, complete, and satisfactory evidence as would rebut the inference deducible from a thirty-seven years acquiescence, which can only be rebutted by proving that for forty years anterior to 1846 the public had a clear and continuous possession as of right and with no interruption.

My Lords, I entirely agree with the judgment of the Lord Ordinary, and I think that the interlocutor under appeal should be reversed and that the interlocutor of the Lord Ordinary should be restored.

Interlocutor under appeal reversed. Interlocutor of the Lord Ordinary restored. The appellant to receive the expenses in the Court below from the date of the Lord Ordinary's interlocutor, and the respondents to pay the costs of this appeal.

Lords' Journals, 4th May, 1885.

Agents for appellant: *Grahames, Currey, & Spens*, for *Webster, Will, & Ritchie, S.S.C. Edinburgh.*

Agent for respondents: *J. B. Allan*, for *John Macpherson, W.S. Edinburgh.*

[HOUSE OF LORDS.]

H. L. (E.) 1885 May 12.

CHRISTIAN B. SVENDSEN AND OTHERS . APPELLANTS;

AND

WALLACE BROTHERS . . . . . RESPONDENTS.

Insurance, Marine—General Average—Expenses of reshipping Cargo and of Ship leaving Port of Refuge.

A ship on a voyage having sprung a dangerous leak, the captain, acting justifiably for the safety of the whole adventure, put into a port of refuge to repair. In port the cargo was reasonably, and with a view to the common safety of ship, cargo, and freight, landed in order to repair the ship. The ship was repaired, the cargo reloaded and the voyage completed:—

Held, affirming the decision of the Court of Appeal, that the cargo owners were not chargeable with a general average contribution in respect of the expenses of reshipping the cargo.

Atwood v. *Sellar* (4 Q. B. D. 342; 5 Q. B. D. 286) discussed.

APPEAL from a judgment of the Court of Appeal (Brett M.R. and Bowen L.J., Baggallay L.J. dissenting (1)), which reversed a judgment of Lopes J. (2).

On a voyage from Rangoon to Liverpool a ship sprang a dangerous leak, which justified the captain for the common safety of the whole adventure in putting into the port of St. Louis in Mauritius for repairs. In port the cargo was landed in order that the ship might be repaired under the circumstances related in the judgment of Lord Blackburn. The cargo was warehoused, and after the repairs had been done, was reloaded. The ship was piloted out to sea, and completed her voyage.

The appellants, the shipowners, brought this action to recover £770 as a general average contribution from the respondents, the cargo owners. The defendants paid £681 into Court, and disputed the remainder. The average statements made out by the adjusters of the appellants and respondents respectively agreed in some respects and differed in others, as appears from the judgment of Lord Blackburn. The only questions raised by the present appeal were whether the respondents were liable for a

(1) 13 Q. B. D. 69. (2) 11 Q. B. D. 616.

general average contribution in respect of the expenses of reshipping the cargo, of pilotage outwards, and of port dues outwards. The Court of Appeal (Brett M.R. and Bowen L.J., Baggallay L.J. dissenting) held that they were not (1), reversing the judgment of Lopes J. in favour of the appellants (2). The only matter decided by the House, as will be seen, was as to the expenses of reshipping the cargo.

March 19, 20, 23. *C. Russell Q.C.* and *A. Cohen Q.C.* (*H. D. Warr* with them) for the appellants:—

This House has for the first time to decide the principle upon which the liability is to be adjusted when a ship puts into a port of distress and the cargo is discharged and stored during repair, reloaded after repair, and the voyage is resumed. The expenses of putting into the port of refuge and unloading, are admitted by the respondents to be general average expenses. The putting into port being an extraordinary measure for the preservation of ship, cargo, and freight from imminent peril, it follows that the expenses of warehousing and reloading the cargo, and of taking the ship out of port, which accrue in consequence of that extraordinary measure, are also general average. The appellants rely on the decision and the reasoning of the Court of Appeal in *Atwood* v. *Sellar* (3). The only difference between that case and the present is that there the ship put into a port of repair, having cut down a mast, in imminent peril. But for that distinction the cases would be identical. Suppose the mast is blown down; the act is as much or as little voluntary as if it is cut down. In *Atwood* v. *Sellar* (3) the non-liability was supported by the alleged practice of average adjusters. In the present case the respondents attempted to prove a custom but failed. The "eminent adjuster" whose opinion is referred to in *Atwood* v. *Sellar* (3) was the Mr. Lowndes who adjusted for the appellants in the present case.

To give rise to a general average, the sacrifice must be voluntary. "Voluntary" has come in this connection to have a special meaning, not the usual one; it means what a prudent man would think

(1) 13 Q. B. D. 69. (2) 11 Q. B. D. 616.
(3) 5 Q. B. D. 286.

H. L. (E.) 1885 SVENDSEN v. WALLACE.

himself compelled to do. The sacrifice was also "extraordinary" in the sense that deviation was necessary; but it is not essential that the sacrifice should be extraordinary. The reasoning of Cockburn C.J. in *Atwood* v. *Sellar* (1) is wholly applicable to the present case, it does not turn at all upon the points of difference. The same is true of the judgment of Thesiger L.J. The expenses of the rent, of reloading, and outgoing, are all incidental to the step taken of going into port for repairs. It is important that the master should have his mind free from questions of expense, to adopt the course most beneficial for the adventure.

The Copenhagen (2), and *Job* v. *Langton* (3), cited in the judgments of the Court of Appeal, support the appellants' contention. If, as was admitted in argument in the latter case, a voluntary stranding gives rise to a general average contribution, it must be because the stranding and the warehousing of the cargo are all to be considered as one operation, and so it was here. See Lowndes on General Average (3rd ed.), pp. 106, 110, 111. There are no very early authorities on the questions in dispute. The earliest is *Da Costa* v. *Newnham* (4), in 1788, in which the same point arose as in this case. That was followed in 1815 by *Plummer* v. *Wildman* (5), which was distinguished as to repairs in the following year by *Power* v. *Whitmore* (6). Those cases are cited in Abbott on Shipping (5th ed.) p. 350, 3 Kent's Commentaries, p. 235, and 2 Arnould on Insurance (2nd ed.), § 335, and the same view is taken of their effect, namely, that all expenses necessarily incurred in a port of refuge, including unloading, warehousing, and reloading, give rise to a general average contribution, if the unloading is necessary for the repair of the ship. See also *Hallett* v. *Wigram* (7), in 1850, Phillips on Insurance, §§ 1320, 1326, and the observations of Lord Campbell C.J. in *Moran* v. *Jones* (8), and Baily on General Average, pp. 35 and 42. *Stewart* v. *West India and Pacific Steamship Company* (9) and *Whitecross Wire Company* v. *Savill* (10) shew that

(1) 4 Q. B. D. 342; 5 Q. B. D. 286.
(2) 1 C. Rob. 289.
(3) 6 E. & B. 779.
(4) 2 T. R. 407.
(5) 3 M. & S. 482.
(6) 4 M. & S. 141.
(7) 9 C. B. 580.
(8) 7 E. & B. 523.
(9) Law Rep. 8 Q. B. 88, 362.
(10) 8 Q. B. D. 653.

damage incidentally done for the common benefit may give rise to general average. What is reasonably in contemplation should be taken into account. See Laws of Oléron, art. 9, cited in Lowndes on General Average, 2nd ed. p. 316. The warehouse rent is part of the expense incurred to save the whole adventure, in which all are quasi partners, and it is incurred during the deviation, for that does not terminate when the ship has reached her port of refuge.

Webster Q.C. and *Myburgh* Q.C. (*J. Gorell Barnes* with them) for the respondents :—

Much depends on whether the case is to be decided on the practice of average adjusters or on principle. In *Atwood* v. *Sellar* (1) the case found a "practice" of average adjusters, not a "custom." Here the respondents rely on custom and principle. On principle it appears that general average must take its rise from the existence of a common peril to the whole adventure, and that all expenses incurred must take their colour from the original cause, namely a general average sacrifice, or sea damage causing a particular average loss, the first cause governing the allocation of expenses. *Atwood* v. *Sellar* (1), properly understood, does not extend to this case, or if it does it is wrong. It is not necessarily for the interest of the cargo-owner that the cargo should go on in the same ship. The ship is repaired to earn freight for the owner, not for the common benefit. As to how far a shipowner is bound to repair his ship, see *Moss* v. *Smith* (2); *Benson* v. *Chapman* (3); *Benson* v. *Duncan* (4); *Shipton* v. *Thornton* (5); Abbott on Shipping, 5th ed. p. 241; *Wilson* v. *Bank of Victoria* (6); and the judgment of Cockburn C.J. in *Atwood* v. *Sellar* (7) citing *Worms* v. *Storey* (8) and *De Cuadra* v. *Swann* (9), but his observations go too far. The master acts in pursuance of his obligation, or as agent of his owner, to earn the freight. When once the goods are in safety there is the dividing line, and, till the decision in *Atwood* v. *Sellar* (1), average adjusters

(1) 4 Q. B. D. 342; 5 Q. B. D. 286.
(2) 9 C. B. 94.
(3) 2 H. L. C. 696.
(4) 3 Ex. 644.
(5) 9 A. & E. 314.
(6) Law Rep. 2 Q. B. 203.
(7) 4 Q. B. D. 356, 357.
(8) 11 Ex. 427.
(9) 16 C. B. (N.S.) 772.

H. L. (E.) 1885 SVENDSEN v. WALLACE.

stopped the general average contribution there, when the goods were landed, and all danger to them was at an end.

The appellants' contention loses sight of the shipowner's obligation towards the cargo-owner. If the ship wants repair the master is bound to effect it on behalf of the shipowner. As to the authorities the text-books are very unsatisfactory. In several editions the expressions vary and some are not supported by the cases cited. The passage from Beawes, Lex Mercatoria, cited in the judgment of Buller J. in *Da Costa* v. *Newnham* (1) and in Marryat's argument in *Plummer* v. *Wildman* (2) seems to have been taken from Riccard, Négoce d'Amsterdam, p. 280: see Benecke, Mar. Ins. chap. v. p. 196 (ed. 1824). *Plummer* v. *Wildman* (3) was qualified by the decision in *Power* v. *Whitmore* (4).

Expenses incurred after the cargo has been put in safety are not the subject of general average: they are subsequent to but not the consequence of the putting into port. On principle landing and storing expenses are not general average charges, but the respondents treated them as such because of the custom to do so. Simply going into a port of distress does not give rise to general average, unless it is done to avoid a common danger, and then it ceases when the common peril ceases.

[They also referred to *Hallett* v. *Wigram* (5); *Hall* v. *Janson* (6); *Job* v. *Langton* (7); *Walthew* v. *Mavrojani* (8); *Birkley* v. *Presgrave* (9); *The Rona* (10); Abbott on Shipping, 12th ed. by Shee J. p. 509, note g.]

A. Cohen, Q.C., in reply:—

The safety of the cargo is not the test, as put contrà: it is not so treated in any of the cases. Suppose a general average act was done, such as cutting down a mast, and though it was not necessary to repair the damage in a port of refuge, the master went there and repaired it; the expenses now in question would

(1) 2 T. R. 414.
(2) 3 M. & S. 484.
(3) 3 M. & S. 482.
(4) 4 M. & S. 141.
(5) 9 C. B. 580.
(6) 4 E. & B. 500.
(7) 6 E. & B. 779.
(8) Law Rep. 5 Ex. 116.
(9) 1 East, 220.
(10) 5 Asp. Mar. Law Cas. 259; 51 L. T. (N.S.) 28.

not be chargeable to general average, because it was not necessary to repair. The test is whether the repairs in port are necessary.

The deviation being a general average act every extraordinary expense which is the consequence of that deviation ought to be the subject of general average. This makes a rule perfectly clear and workable in practice: and is the rule adopted by foreign nations as pointed out by Thesiger L.J. in *Atwood* v. *Sellar* (1).

The House took time for consideration.

May 12. LORD BLACKBURN:—

My Lords, the question intended to be brought before this House is raised in a somewhat unusual way.

The appellants (plaintiffs below) are the owners of a vessel—the *Olaf Trygvason*. The nationality of the vessel is immaterial. She took on board at Rangoon a cargo of rice. A bill of lading for the whole cargo was signed, of which the material part is as follows:—"Shipped in good order and well-conditioned by the Bombay Burmah Trading Corporation, Limited, in and upon the good ship called the *Olaf Trygvason* now riding at anchor in the Rangoon river, and bound for Scilly, Falmouth, Plymouth, or Cowes for orders, thirteen thousand five hundred and eighty-three bags cargo rice, to be delivered in the like good order and well-conditioned at the port of discharge (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatsoever nature and kind excepted) unto order or to its assigns. Freight for the said goods payable as per charterparty." The ship was ordered to Liverpool.

The respondents (defendants below) are merchants in London who purchased the cargo of rice and became assignees of the bill of lading. On the arrival of the ship at Liverpool the respondents, as holders of the bill of lading and consignees of the whole cargo, were entitled to have the cargo delivered to them on discharging the lien of the shipowners. But the captain had a lien on it, not only for the freight, as to which there was no dispute,

(1) 5 Q. B. D. 299.

H. L. (E.) 1885 SVENDSEN v. WALLACE. Lord Blackburn.

but also for the payment of such disbursements as formed a charge on the cargo, as to the amount of which there was and is a dispute, and also for any amount which the cargo had to contribute to general average, as to the amount of which, also, there was and is a dispute.

This often occurs, and it gives rise to a difficulty which is well expressed in the preamble to the average bond signed in this case:—"Whereas the said ship lately arrived in the port of Liverpool on a voyage from Rangoon, and it is alleged that during such voyage she met with bad weather and sustained damage and loss, and that sacrifices were made and expenditure incurred which may form a charge on the cargo or some part thereof, or be the subject of a general average contribution, but the same cannot be immediately ascertained, and in the meantime it is desirable that the cargo should be delivered."

The mode in which this difficulty is commonly dealt with has, at least for more than eighty years (see *Myer* v. *Van der Deyl* (1)), been, that the captain agrees to give up his lien on payment of the freight payable on delivery, and the various consignees of the cargo agree, in consideration thereof (and if required, give security), to pay to the owners of the ship the proper proportion of any particular or other charges which may be chargeable on their respective consignments, or of any general average to which the owners of such consignment as such may be liable. As in the present case, there was only one owner of the whole cargo, and no dispute as to either the quantity of the cargo or the amount of the freight; this left only two things to be determined —the amount of the special charges on the cargo which were payable by the respondents, and the amount of the general average charges of which the respondents have to pay the proportion payable in respect of the cargo and of the freight paid in advance at Rangoon, which in effect was a part payment of the price of so much of the cargo, the proportion payable in respect of the ship and of the freight not yet paid being payable by those interested in them.

The facts as to what took place on the voyage, what were the disbursements actually made, and under what circumstances

(1) Abb. on Shipp. 5th ed. p. 362.

they were made, cannot be proved by legal evidence without much delay and expense; but at least, when there is no suspicion of fraud or falsehood, the ship's papers enable an average adjuster of competent skill to approximate to them sufficiently to decide the case as an arbitrator, if the parties choose to give him authority so to act, or, if they do not so authorize him, to apply the principles generally acted on by average adjusters, so as to produce a practical result on which the parties can and generally, if the average adjuster is of repute, do act as having the moral weight of an award, though either party may, if they please, question his findings either of fact or of law, for it is not an award.

In the present case two firms of repute, Lowndes & Ryley, of Liverpool, and W. Richards & Son, of London, were employed to prepare adjustments. Each, as is usual, prefixed to the statement extracts from the ship's papers, shewing the state of facts on which they acted. These are almost identical; and I think, looking at the two adjustments, they are agreed up to a certain point, and if it is open to me to form my opinion from the ship's papers, I should say that, so far, no reasonable person could differ from them.

The vessel sailed from Rangoon on the 30th of March, 1880. She took the ground at low tide, but got off at high tide, and proceeded on her voyage after this accidental stranding. Till the 19th of May she continued on her voyage, and on that day she deviated from the course of the voyage and ran for Mauritius. During these seven weeks she encountered strong winds and heavy seas, which caused the ship to strain, and labour, and make water. There was nothing, however, beyond ordinary perils of the seas, except that some spars and canvas were sacrificed in order to erect a windmill to assist in working the pumps. The cost of replacing those, less the usual allowance of one third new for old, about £10, is allowed in general average by both adjusters. But it is clear that the vessel did not run for Mauritius on account of the windmill, and, except as evidence confirmatory of the extent to which she was leaking by the 19th of May, this is not material. Had the deviation not been justified by a sufficient cause it would have rendered the shipowners liable (see *Davis* v.

H. L. (E.) 1885 SVENDSEN v. WALLACE. Lord Blackburn.

Garrett (1)), and therefore it is important to see what was the state of the vessel on the 19th of May. Not only was she leaking at the rate of nine inches an hour, but when she came to anchor on the 22nd in the harbour of St. Louis she was found in the harbour to be making 10½ inches of water per hour; so that, though there is no extraordinary weather noticed, the leak had in that day and a half increased greatly, and it was necessary to hire a considerable number of shore labourers, who were employed to pump her. The surveyors, who saw her on the 22nd whilst afloat in the harbour, found her still making 10½ inches an hour, and recommended the cargo to be discharged until the leak stopped, or the vessel became sufficiently lightened to be placed in dry dock. On the 4th of June, the whole cargo with the exception of about 100 tons having been discharged, the surveyors again examined her, and found the vessel still making seven inches of water per hour. They recommended the vessel to be put in dry dock for further examination of her bottom, which was done.

It seems impossible to come to any other conclusion than that the vessel, though perhaps she might have reached her destination with such a leak, would have been in great danger, and consequently that it was quite justifiable to run into St. Louis; nor can it, I think, be disputed that everything which was done after the vessel came into harbour, until the vessel was removed into the dry dock, was reasonably done with a view to the common safety of ship, cargo, and freight, which, while such a leak existed, were not in safety even in the harbour. Both adjusters must have agreed on this, for I find that each of them allows as general average all the extra expenses up to that date, including port dues and pilotage inwards, the hire of the labourers who pumped, the expenses of the survey, and the expense of landing the portion of the cargo unshipped between the 22nd of May and the 4th of June, as well as the cost of replacing the spars, &c., sacrificed to make a windmill, amounting, in the whole, in round numbers to nearly £300 to general average. And if that had been all, there would have been no difference between them, and probably no dispute between the parties. But a difference, which

(1) 6 Bing. 716.

any one who has read the case of *Atwood* v. *Sellar* (1), and who was aware that the members of the firm of W. Richards & Sons are leading members of the association mentioned in the 5th paragraph of the special case there stated, and that Mr. Lowndes was the eminent average adjuster mentioned in the 6th paragraph, must have anticipated, arose. Messrs. Lowndes and Ryley charged to general average the expenses of warehousing and insuring the cargo when on shore, amounting in round numbers to £190, and the expenses of reshipping the cargo, amounting in round numbers to £446, and the outward dock dues, amounting in round numbers to £20, and the outward pilotage, about £5. They charged about £30 as special average to cargo, and nothing to freight. Messrs. W. Richards & Sons charged the expenses of the cargo on land, amounting in round numbers, as already stated, to £190, to cargo, as well as the smaller item of £30, as to which there is no controversy; and the other items which Messrs. Lowndes charge to general average, amounting in round numbers to near £500, to freight.

Both agree in charging the expenses of taking the ship into dry dock, and the much more heavy expenses of repairing the vessel, amounting altogether to £1866, to ship and owners, so that there is no dispute as to those items.

There is some difference apparently as to the value put upon the ship as a contributory subject, into which it is not necessary to inquire.

The result is, Lowndes & Co., apportioning the general average as they made it out amongst the subjects contributory as they valued them, made Messrs. Wallace, as owners of the cargo and the prepaid freight, liable to pay as contribution to general average £740, and in respect of particular average £30, in all £770. I omit shillings and pence. Messrs. Richards & Sons made them liable to pay as contribution to general average £467, as particular average on the cargo £215 (including the £30), in all £681. I again omit shillings and pence. Messrs. Wallace paid that sum, and for the difference between it and £770 this action was brought.

There were two issues joined, one on a plea that there was a

(1) 4 Q. B. D. 342; 5 Q. B. D. 286.

H. L. (E.) 1885 SVENDSEN v. WALLACE. Lord Blackburn.

custom so general as to have the effect of being incorporated in all contracts, by which the rule of practice of adjusters contended for by the respondents was established, which was denied. The other was a general plea of payment before action of £681 13*s.* 1*d.*, to which the plaintiffs replied that they had received it, but that it was not enough to satisfy their claim. Both issues came on to be tried before Lopes J., and a special jury. The judge ruled that there was no evidence fit to be left to the jury in support of the custom. On this there has been no appeal to this House. The jury were discharged on the issue as to the sufficiency of the payment, and that was reserved for further consideration. No evidence was called on this issue, and nothing was said as to how the facts were to be ascertained if it became material to ascertain any of them not expressly admitted. I do not think it was supposed by either side, certainly, from the terms of his judgment, not by Lopes J. (1), that anything could depend on the special circumstances; it was not until in reading the judgment of Bowen L.J. (2), I came upon this opinion: "The question whether extraordinary expenditure after the entry into a port of refuge is rightly chargeable to general average *necessarily* depends on the circumstances of each case," and on further consideration agreed in it, that I became aware of the importance of having some means of ascertaining what the circumstances were. Without some such power, no judgment, except a venire de novo, could be given, unless it could be laid down as a general proposition of law, either that no expenses of warehousing the cargo and afterwards re-shipping it in a port of refuge can ever be general average expenses, or that they must always be so. I am not prepared to assent to either proposition. Any state may, by its legislature, enact that within its territories the law shall be either way. Judging merely from the language of their codes (which however is often apt to mislead, unless construed with reference to their law and usage), I should say that some foreign nations have enacted in opposite ways. There is, however, no English enactment on the subject. I have no doubt that both parties would, if it had occurred to any one that it was necessary or even desirable so to do, have readily agreed to give the Court

(1) 11 Q. B. D. 616. (2) 13 Q. B. D. 69, 85.

power to look at the ship's papers, and, if it thought fit, draw inferences from them as an average adjuster would do. I propose to deal with this case as if such a power was given.

In *Simonds* v. *White* (1) Abbott C.J. says: "The principle of general average, namely, that all whose property has been saved by the sacrifice of the property of another shall contribute to make good his loss, is of very ancient date and of universal reception among commercial nations. The obligation to contribute, therefore, depends not so much upon the terms of any particular instrument as upon a general rule of maritime law. The obligation may be limited, qualified, or even excluded by the special terms of a contract as between the parties to the contract, but there is nothing of that kind in any contract between the parties to this cause. There are however many variations in the laws and usages of different nations as to the losses which are considered to fall within this principle."

The point decided in that case was that the loss was to be adjusted according to the law of the place of the destination, in that case Russia, and that the Russian adjuster was to adjust it according to the Russian law, which of course was to be gathered from the Russian edicts and the decisions of the Russian judicature; and that, though the ship and the parties were English, the goods owners could not recover back so much of the money as would not have been charged to them on an adjustment of average made according to the law of England. As in the present case the place of delivery was English, this is an authority, if one was required, to shew that the law and usage of foreign nations where they differ from our own are irrelevant. But it will be observed that Abbott C.J. expressly says that a contract might alter the whole; and in *Wilson* v. *Bank of Victoria* (2) it was intimated that a custom tacitly making it part of the contract that any particular principle should be applied might alter the whole. I think that, unless it was proved that there was such a custom as to be tacitly incorporated, it could have no such effect. And I have no doubt that the issue, which has not been brought here by appeal, was rightly decided.

I think, however, there is much force in the concluding obser-

(1) 2 B. & C. 811. (2) Law Rep. 2 Q. B. 203.

H. L. (E.) 1885 SVENDSEN v. WALLACE. Lord Blackburn.

vations of Manisty J. in *Atwood* v. *Sellar* (1). I agree with him at least thus far, that a general practice, long continued amongst English adjusters, affords strong ground for thinking that the practice is one which is not in general inconvenient, and that it throws a considerable onus on those who impugn it to shew that the particular circumstances are such as to render an adherence to the practice in that case against principle.

Before proceeding further, I think it desirable to consider what is the question raised on the issue reserved for further consideration. The plaintiffs claimed the sum which Messrs. Lowndes & Ryley made payable, viz. £770. The defendants had paid the sum which Messrs. W. Richards & Sons made payable by them. The issue was whether all that was really due had been paid. It is to be observed, first, that the points on which Messrs. W. Richards & Sons differ from Messrs. Lowndes & Ryley are not all in favour of the defendants. If the £190, which represents the warehousing rent, and fire insurance, is properly charged to cargo, the defendants have to pay the whole of it. If it is properly charged to general average, they have only to pay their proportion of it, or somewhat less than one half. That, if it stood alone, would make nearly £100 more payable by the defendants. But if the £450, which is the cost of reshipping, is properly charged to freight, the defendants are not liable to pay any portion of it. If it is properly charged to general average they would have to pay about half of it. So that that item makes a difference of about £230. If, in addition, the £20 for the cost of going out of port is properly charged to freight, that makes a further difference of about £10. It is not, therefore, necessary to decide anything more than whether these two items are, under the circumstances of the case, properly chargeable to general average or not. If they are not so chargeable, the order appealed against is right, for the defendants have paid enough, and more than enough, whether the £190 is properly chargeable to cargo or not; and it is unnecessary to consider that question, except in so far as it may throw light on the principles which are to guide the decision of the first and most important one.

I do not think it necessary to inquire what would be the proper course if the seeking the port of refuge had been solely for the

(1) 4 Q. B. D. 352.

purpose of doing repairs, the cargo not being in any danger. Such a case may perhaps sometimes, though rarely, occur. Nor do I think it necessary to inquire what would be the proper course if the ship and cargo were both safe in the harbour of refuge, and the unloading of the cargo was entirely for the purpose of facilitating the repairs. Such a case seems more likely to happen than that first supposed. I think on examining the two adjustments, and exercising the power which I have assumed to be given, there can be no doubt that the cargo on board the ship, leaking to the extent which she did, was not safe even in harbour until the ship was so far lightened that she could be taken into dry dock. Should the expense of reloading her, after the repairs were made, be charged to freight, the goods having been taken out under such circumstances? I think it should.

I am afraid I have not understood the reasoning on which Cockburn C.J. in his judgment in *Atwood* v. *Sellar* (1) comes to a contrary conclusion. If I have, I must express dissent from it.

The ordinary contract between shipowner and merchant is that the goods shall be carried to their destination, and shall there be delivered, unless prevented by the excepted perils. And this generally should be done in the original ship. Whenever the ship is disabled it must, in order literally to fulfil this contract, be necessary to repair the ship so far as to make her fit to carry on the cargo, and if any part of the cargo has been taken out to reship it.

Rosetto v. *Gurney* (2) was a case between the owners of corn insured from Odessa to Liverpool and their underwriters. The plaintiffs claimed for a total loss, and the underwriters paid money into Court. The cargo was at Cork in a very damaged state, but by great skill, and at considerable cost, was prevented from turning into manure, and was sold at Cork, a considerable part of it being still corn. The verdict was entered for a total loss. A rule for a new trial was obtained on various grounds; one, on which it was made absolute, was that the judge had not properly directed the jury as to the effect of the extra cost of conveyance in a new bottom from Cork, the port of distress where the wheat was sold, to Liverpool, the port of destination.

(1) 4 Q. B. D. 354.

(2) 11 C. B. 167, 188.

H. L. (E.) 1885 ~~ SVENDSEN v. WALLACE. —— Lord Blackburn. ——

The Court say as to this, "If the voyage is completed in the original ship it is completed upon the original contract, and no additional freight is incurred. If the master tranships because the original ship is irreparably damaged without considering whether he is *bound* to tranship or merely *at liberty* to do so, it is clear that he tranships to earn his full freight; and so the delivery takes place upon the original contract." There never was in the present case any question as to the *Olaf Trygvason* being irreparably damaged; but she was so far damaged that it was certain that there would be some delay (it turned out to be about six weeks) before the *Olaf Trygvason* was in a fit state to carry the goods on to Liverpool. And if there had been a good ship at St. Louis willing to carry the goods to their destination for less than the agreed freight from Rangoon, it might have been for the benefit of all that the goods should be shipped on that vessel at once, carried on, and delivered to the consignee without delay. Such was the course pursued in *Shipton* v. *Thornton* (1), where the original shipment was from Singapore to London in the *James Scott*. She put into Batavia in distress, and there the goods were transhipped into the *Mountaineer* and the *Sesostris*, carried to London, and there delivered to the owner of the *James Scott* at a cost less than the amount of freight which he would have earned had the goods been carried on in the *James Scott*. He delivered them to the consignee who produced the original bill of lading by the *James Scott*. The consignee refused to pay freight at the rate in the bill of lading of the *James Scott* from Singapore to London, though he paid that from Batavia agreed on in the bills of lading of the *Mountaineer* and the *Sesostris*. The decision was, that whether or not the captain was bound to tranship, he was at liberty to do so, and having done so, had earned his full freight, the expense which he had incurred to earn it being certainly not general average, but I think a particular average paid by the shipowner to earn his freight. My conclusion is that, if instead of transhipping, the captain waits till the original ship is repaired and then re-ships on that original ship, the cost of so doing should not be general average but particular average to earn the full freight. Cockburn C.J. seems to think that in all cases where

(1) 9 A. & E. 314.

the ship is disabled, whether she can be repaired or not, the original contract is dissolved and a new one formed by law. This seems to me in direct conflict with the two decisions I have just cited; and even if it were so, I think it is somewhat in the nature of a petitio principii to say that one of the terms of the new contract should be that the cost of transhipment or reshipment, as the case may be, should be general average.

The judgment however of the Court of Appeal, delivered by Thesiger L.J., does not proceed on this ground. I have some difficulty, after reading the statement as to the grounds on which the Court of Appeal proceeded, given by Baggallay L.J. in his judgment in the present case, in saying on what ground it does proceed.

The special case in *Atwood* v. *Sellar* (1) was express that the ship was injured by a voluntary sacrifice, and was thereby compelled to put in to Charleston to repair the said damage. It is not expressly said either way whether the cargo was in any danger. Baggallay L.J., who was a party to that judgment, says that it was decided on the ground that putting into the port of refuge was necessary for the safety of both ship and cargo, and that he, at least, thought that it was immaterial what was the cause of that necessity. Yet I think there is much reason for doubting if Thesiger L.J. quite agreed in this. He says, "The principle which underlies the whole law of general average contribution is that the loss, immediate and consequential, caused by a sacrifice for the benefit of cargo, ship and freight, should be borne by all. This principle is in the abstract conceded by counsel for the defendants, and its application to the present case is admitted to the extent of allowing the expenses of unloading the goods, for the purpose of doing the necessary repairs to enable it to proceed on the voyage, to be the subject of general average contribution, but they attempt to distinguish such expenses from those of warehousing and reloading the cargo, and of outward port and pilotage charges, by the suggestion that the common danger to the whole adventure is at an end when the goods are unloaded, and that general average ceases at the point of time when the common danger ceases." This is I think a fair statement of the argument

(1) 4 Q. B. D. 342.

H. L. (E.) 1885 SVENDSEN v. WALLACE. Lord Blackburn.

of the respondents' counsel in the present case. Afterwards he says, "The going into port, the unloading, warehousing, and reloading, are at all events parts of one act or operation contemplated, resolved upon, and carried through for the common safety and benefit, and properly to be regarded as continuous." This was much relied on by the counsel for the respondents. If I thought it was the state of the case before the House, I should consider whether in such a case it might not fairly be argued that the whole of these operations were to be considered as parts of the expense of repairing the damage, and therefore in a case where the cause of the damage was such that the expense of repairing it ought to be borne by all, as was the case in *Atwood* v. *Sellar* (1), to be borne by all, but that in a case where the cause of the damage was such that the expense of repairing it ought to be borne by the ship only, which is the present case, to be borne by the ship only. But having come to the conclusion that such is not the state of the case before the House, I do not enter into this inquiry.

Having come to the conclusion that, under the circumstances of this case, the expenses of reloading &c. should not be placed to general average, and that being enough, if your Lordships agree with me, to shew that the respondents have paid more than enough, it is not necessary to consider whether the smaller sum of £20 ought also to have been charged to ship or freight and not to general average. I agree with Bowen L.J. in what he says at page 90, that that is a more difficult question than the other. And as the amount is not sufficient to turn the scale, it is not necessary to decide it. I should think it seldom involved any sum so great as to be of practical importance, and I prefer leaving it undecided.

I shall therefore move that the order appealed against be affirmed, and the appeal dismissed; the appellants to pay the costs.

LORD WATSON:—

My Lords, I also am of opinion that in this case the order appealed from ought to be affirmed with costs. I have had the

(1) 4 Q. B. D. 342.

advantage of considering the opinion which has just been delivered by my noble and learned friend; and seeing that it expresses all that I desire to say upon the subject, I shall not add any observations.

LORD FITZGERALD:—

I too, my Lords, have had an opportunity of reading and considering the very able and instructive reasons given by my noble and learned friend now on the woolsack for his opinion, and to that opinion I can add nothing save to express my entire concurrence in it.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 12th May 1885.

Solicitors for appellants: *Field, Roscoe & Co., for Bateson, Bright & Warr, Liverpool.*

Solicitors for respondents: *Waltons, Bubb & Walton.*

[HOUSE OF LORDS.]

H. L. (I.) 1885 May 18.

EDWARD THOMAS WAKEFIELD . . APPELLANT;

AND

WILLIAM HAMILTON MAFFET, JOHN FREDERICK HARRIS, AND JOHN JAMES DOYLE . . . . . RESPONDENTS.

Marriage Settlement — Construction — Vested Interest — "Payable" meaning "vested"—Shares "to be paid" at twenty-one—Gift over on Death before Share "payable."

By a marriage settlement lands were conveyed upon trust for husband and wife successively for life, and after the death of the survivor, "to levy out of the said lands and premises . . . . the sum of £3000 . . . . to be divided to and among all the children of the said intended marriage, save and except such child and children as under the limitations aforesaid shall succeed to the enjoyment of the lands and premises hereby conveyed . . . . in equal shares and proportions as tenants in common and not as joint tenants, the share of such child or children as shall be a son or sons to be paid to him or them upon his or their respectively arriving at the full age of twenty-one years, and the share or shares of such of them as shall be daughters to be paid upon their respectively arriving at their full age of twenty-one years, or day or days of marriage, whichever shall first happen: Provided always that such marriage during minority shall be had by and with the consent and approbation of" the parents "or the survivor of them: with interest for the same by way of maintenance at the rate of £6 by the hundred to be computed from the day of the death of the survivor of" the parents: "with benefit of survivorship to the survivors or survivor of such children if any of such children shall die before his, her, or their share or shares shall become payable unmarried and without leaving issue as aforesaid, it being the true intent and meaning of these presents that none of the children of the said intended marriage, who under the limitations herein contained shall become entitled to an estate in possession in any part of the lands and premises hereby conveyed . . . . shall be entitled to any part of" the said sum.

A son attained twenty-one and died in the lifetime of his father:—

Held, affirming the decision of the Court of Appeal in Ireland, that there being no words indicating a clear intention to make the vesting of children's shares contingent on their surviving both parents, the rule laid down in *Emperor* v. *Rolfe* (1 Ves. Sen. 208) applied, and the son took a vested interest in his share on attaining twenty-one.

APPEAL from an order of the Court of Appeal (Ireland) (1).

This was an action brought in the Chancery Division (Ireland)

(1) Ir. L. Rep. 13 Ch. 17.

by the appellant to carry out the trusts of a settlement dated the 14th of October 1817 in relation to a sum of £3000 (late Irish currency), and to have the same sum, together with the interest thereon at £6 per cent. per annum from the death of Thomas Christy Wakefield, declared well charged on the hereditaments subject to the trusts of the settlement.

The settlement was made upon the marriage of Thomas Christy Wakefield and Mary Anne Wilcocks, the father and mother of the appellant, and the material clause upon which the question turned is set out in the head-note, and also in the judgment of Lord Blackburn.

There were five children of the marriage, Edward Thomas (the appellant), Thomas Haughton, and three daughters. It was admitted that in the events which had happened none of the daughters took any interest in the fund. Mary Anne Wilcocks, afterwards Wakefield, died in 1857; Thomas Haughton Wakefield attained the age of twenty-one, and died unmarried in 1861. By his will he bequeathed the residue of his real and personal estate to his father, Thomas Christy Wakefield, who duly proved the will.

It also appeared that under the will of Thomas Haughton, the grandfather of Mary Anne Wilcocks, Thomas Haughton Wakefield, as her second son, took an interest in some part of the lands included in the settlement.

Thomas Christy Wakefield died in 1878, and the respondents were the executors and trustees under his will.

Sir Edward Sullivan M.R. held that the appellant was entitled to one half of the charge, and that the personal representative of Thomas Haughton Wakefield was entitled to the other half, and this decision was affirmed by the Court of Appeal in Ireland, consisting of May C.J. Fitzgibbon and Barry L.JJ. (1), reported under the name of *Wakefield* v. *Richardson.*

The appellant appealed from so much of this decision as declared the representatives of Thomas Haughton Wakefield entitled to a moiety of the charge of £3000.

May 15, 18. The appellant in person:—

Thomas Haughton Wakefield took an interest in some of the

(1) Ir. L. Rep. 13 Ch. 17.

H. L. (I.) 1885 WAKEFIELD v. MAFFET.

lands included in this settlement, and therefore by the terms of the settlement he is excluded from any share in the sum of £3000 directed to be raised.

Secondly, if he was entitled to a share, he died before his share became payable, unmarried, and without issue, and the survivorship clause for the benefit of the other children applied. If the decision in *Langston* v. *Langston* (1) is correct it covers this limitation, and *Seamer* v. *Bingham* (2) raised the same point. In the events which have happened I am entitled to the whole of the £3000 directed by the settlement to be raised for the children. The case is not within *Emperor* v. *Rolfe* (3); see the observations of Jessel M.R. on that case in *Day* v. *Radcliffe* (4), and *Woodcock* v. *Duke of Dorset* (5) does not apply. See *Codrington* v. *Foley* (6) and *Powis* v. *Burdett* (7). The natural meaning of the word "payable" should be adhered to: *Wordsworth* v. *Wood* (8), per Lord Campbell; *Bootle* v. *Scarisbrick* (9); *Grey* v. *Pearson* (10), per Lord Wensleydale; *Roddy* v. *Fitzgerald* (11); *Abbott* v. *Middleton* (12), per Lord Wensleydale.

"Payable" in the clause in question means payable on the death of the tenant for life. It has only been construed to mean "vested" in cases where but for such construction the children of a deceased child would not have been let in. The cases of *Willis* v. *Willis* (13); *Hope* v. *Clifden* (14); and *Powis* v. *Burdett* (15), shew that the state of authority upon the point was not clear until the decision of James V.C. in *In re Wilmott's Trusts* (16), which is in my favour. In *Hallifax* v. *Wilson* (17) the reasoning of Sir William Grant M.R. was founded on *Roebuck* v. *Dean* (18), which was a wrong decision, and was overruled by *Wordsworth* v. *Wood* (19). The later cases are in my favour: *Day* v. *Radcliffe* (20);

(1) 2 Cl. & F. 194.
(2) 3 Atk. 56.
(3) 1 Ves. Sen. 208.
(4) 3 Ch. D. 654.
(5) 3 Bro. C. C. 569.
(6) 6 Ves. 364.
(7) 9 Ves. 428.
(8) 1 H. L. C. 129, 156.
(9) 1 H. L. C. 167.
(10) 6 H. L. C. 61, 106.
(11) 6 H. L. C. 823.
(12) 7 H. L. C. 68, 114.
(13) 3 Ves. 51.
(14) 6 Ves. 499.
(15) 9 Ves. 428.
(16) Law Rep. 7 Eq. 532.
(17) 16 Ves. 168.
(18) 2 Ves. 265.
(19) 1 H. L. C. 129.
(20) 3 Ch. D. 654.

Creswick v. *Gaskell* (1). If "payable" means "vested" the gift over is nugatory, and can never take effect. As it was a charge on real estate it could not vest until the time of payment: *Prowse* v. *Abingdon* (2); *Van* v. *Clark* (3); *Lowther* v. *Condon* (4); 1 *Jarman* on Wills, 4th ed., p. 834. *Mostyn* v. *Mostyn* (5) is exactly the same case. See also *Chevaux* v. *Aislabie* (6); *Selby* v. *Whittaker* (7); *Packham* v. *Gregory* (8). The modern decisions which appeared to be against me are, *Mocatta* v. *Lindo* (9), which has been overruled by James V.C. in *In re Wilmott's Trusts* (10), in which the limitations are identical with these. That case also overruled *Mendham* v. *Williams* (11). The principle of the decision in *Jones* v. *Jones* (12) does not apply to charges on land. *In re Watson's Trusts* (13) shews that settlements and wills are not to be construed in the same way, and in *Swallow* v. *Binns* (14), which was relied upon in the Court below, the language was not the same as in this case. *In re Deighton's Settled Estates* (15) shews that the principle on which the Court will incline to early vesting is when it cannot otherwise provide for the children of a deceased child. See also *Day* v. *Radcliffe* (16); *Jeyes* v. *Savage* (17), per Mellish L.J. There is nothing in the limitations in this case to take it out of these later authorities. As to the meaning of "unmarried," see *Clarke* v. *Colls* (18). See also *Morrall* v. *Sutton* (19), per Coleridge J. The other clauses of the settlement support my views. The class of beneficiaries was not ascertainable till after the death of the tenant for life: *Billingsley* v. *Wills* (20); *Schenk* v. *Legh* (21), citing *Lloyd* v. *Bird*; *Cripps* v. *Wolcott* (22).

Davey Q.C. and *Chadwyck Healey* for the respondents were not called upon.

(1) 16 Beav. 577.
(2) 1 Atk. 482.
(3) 1 Atk. 510.
(4) 2 Atk. 127.
(5) 1 Col. Ch. C. 161.
(6) 13 Sim. 71.
(7) 6 Ch. D. 239.
(8) 4 Hare, 396.
(9) 9 Sim. 56.
(10) Law Rep. 7 Eq. 532.
(11) Law Rep, 2 Eq. 396.
(12) 13 Sim. 561.
(13) Law Rep. 10 Eq. 36.
(14) 1 K. & J. 417.
(15) 2 Ch. D. 783.
(16) 3 Ch. D. 654.
(17) Law Rep. 10 Ch. 555.
(18) 9 H. L. C. 601.
(19) 1 Ph. 533, 544.
(20) 3 Atk. 219.
(21) 9 Ves. 300.
(22) 4 Madd. 11.

H. L. (I.) 1885 WAKEFIELD v. MAFFET.

LORD BLACKBURN:—

My Lords, it is not necessary in this case to call upon the respondent's counsel to argue it.

The question arises entirely upon the construction of a very few words in a marriage settlement. That marriage settlement, like all marriage settlements, was partly made for the purpose of providing for the expected children of the marriage; and when the parties were so settling there were certain things which they would probably wish to do, but the question is, what have they actually said, taking the words in their natural and ordinary meaning no doubt, but taking them also in the meaning which by a series of decisions has been established under such circumstances, bearing in mind the rules of law which are applied to the construction of similar instruments?

Now as to this particular instrument there is a provision made for raising £3000. There was a life interest in the intended husband and wife. I forget for the moment whether it was in the husband and wife or only in the husband—it does not greatly matter, but there was a life interest. The £3000 was to be raised, and it was "agreed that the same shall be divided to and among all the children of the said intended marriage save and except such child and children as under the limitations aforesaid shall succeed to the enjoyment of the lands and premises hereby conveyed or meant or intended so to be." And then follows, some time afterwards, "it being the true intent and meaning of these presents that none of the children of the said intended marriage who under the limitations herein contained shall become entitled to an estate in possession in any part of the lands and premises hereby conveyed or meant or intended so to be, shall be entitled to any part of the several sums hereby agreed to be distributable or either of them, such children being supposed to be already sufficiently provided for." Upon that the appellant in person has raised a point which he complains was not considered in the Court below. It does not seem to have been raised in the Court below at all, but it is a point which is totally untenable.

It appears in fact that children of the marriage were born. There was a second son born besides the appellant, namely, Thomas Haughton Wakefield, and there never was a third son,

but there were daughters. The lands were conveyed and settled. As the lands came to the daughters ultimately they were accordingly within the exception which I have mentioned, they were excepted because "under the limitations aforesaid they succeeded to the lands and premises hereby conveyed." Thomas Haughton Wakefield, the second son, never did succeed to any of those lands under the limitations aforesaid, but under the will of the grandfather he had an interest in some of the lands dealt with in the settlement; it appears by the recitals in the settlement that such an interest did exist; and the argument, as well as I could understand it, endeavoured to be put forward was this, that inasmuch as Thomas Haughton Wakefield was provided for by the grandfather in a portion of this land it would have been just and right for those who were making the settlement, in considering about the second son, to treat him as being so well provided for that he ought not to have any portion of the £3000. Whether the settlors thought of that, or whether if it had been pointed out to them they would have done it or not I do not know. I do not think there was anything unjust or unreasonable in their doing what they evidently did do, they said: "If any of the children under this settlement become entitled to the lands they shall not have a share in the £3000," which was right, but they did not say that if any of the children were entitled or should be entitled to some interest which other persons had given, whether recited in this settlement or not, they should be the worse off upon that account; and that being so, the point which was urged here at the beginning of this argument, but which was not made below, or if raised was not maintained, is evidently utterly untenable.

But now comes the point upon which there really is some difficulty, and upon which there is something to be said, as to the construction of the deed itself. When a settlement of this kind is made, to provide for children, and the nature of it is that certain land or a certain fund is to go for life, and then the settlors are providing for a sum to be taken among the children, it is quite reasonable and proper, when they are making the settlement, to remember that it is by far the most convenient course, as a general rule, that the fund which is to be given to the children shall be so given and so arranged that when the time comes at which it ought

H. L. (I.) 1885 WAKEFIELD v. MAFFET. Lord Blackburn.

to be used, when the sons are starting in life, which, as a general rule, is at twenty-one, or in the case of daughters, when they attain the age of twenty-one or marry, whichever may be first, their portions shall be settled upon them; and, accordingly, those who were making the settlement would recollect that. What they actually do decide must depend upon the will of the settlors at the time. They have a right to settle what they think best, but they should remember that that is convenient as a general rule, and that anything else would be inconvenient. Accordingly, when they are making a settlement, such as we have here, the words which they use are these:—"As to the said sum of £3000, it is agreed that the same shall be divided to and among all the children of the said intended marriage" (I pass by the parenthesis on which I have already commented) "in equal shares and proportions as tenants in common, and not as joint tenants, the share of such child or children as shall be a son or sons to be paid to him or them upon his or their respectively arriving at the full age of twenty-one years, and the share or shares of such of them as shall be daughters to be paid upon their respectively arriving at their full age of twenty-one years or day or days of marriage, whichever shall first happen."

Now it is obvious, that "to be paid" there does not bear the sense of "to be distributed." The common sense and generally convenient settlement to make in such a case would be to say that it shall be vested in such children on their attaining the age of twenty-one, or marrying, and shall then, if the tenants for life are dead, and it is distributable, be distributed and paid to the children, and that if the tenants for life are still alive, it shall be distributed to the children after the death of the tenants for life, but shall be vested at these particular times. That that is not the natural and ordinary meaning of the words "to be paid" I quite agree. Now, as long ago as the cases which have been cited, quite a hundred years ago, it was established that that was so natural and reasonable in such a settlement, that though it was a straining of the words (I do not think that any one has ever doubted that the words would admit of it) yet the settlement should be construed as if the words "payable to him or them upon his or their arriving at the age of twenty-one years," had been developed in

the way in which I have put it, namely, that it should be vested in them upon their arriving at the age of twenty-one years, or in the case of daughters upon their attaining that age or marrying, though it was not to be distributed until the tenants for life were dead, whenever it might be—it might be before or it might be afterwards. But it never was said, nor is it doubtful, I think, and it could not have been said, that if there were other words in the instrument which shewed that the settlors meant something different, you should put this construction upon the word "payable," and consider it as meaning "vested," if there was something sufficient to shew the contrary to have been the intention.

The cases which have been referred to, *In re Wilmott's Trusts* (1) and others, were not, as Mr. Wakefield appears to suppose, declaring or making new law and overruling old cases. The first of them could not overrule old cases, as it was not in a Court of Error. But it was correctly enough said that if there was sufficient upon the face of the instrument to shew that the word "payable" was not used in the sense of being vested—though the construction of the instrument, seeing that it was a settlement, would be to put that sense upon it, unless there was something more than the mere fact that the word "payable" does not in its natural and ordinary meaning convey that idea of being vested—then you must not give it that meaning; but unless there was something more, you would put that construction upon it. These cases said, and said truly, if there is more, you shall not put that construction.

Now comes the question, What is there here which can be said to shew that a construction—which is not I think the construction that, if one were taking for the first time an instrument using such words, one would naturally put upon the words "paid" or "payable," as meaning vested though not yet distributable—is not the construction to be put upon them here? The words are, "as tenants in common and not as joint tenants, the share of such child or children as shall be a son or sons to be paid to him or them upon his or their respectively arriving at the full age of twenty-one years, and the share or shares of such of them as shall be daughters to be paid upon their respectively arriving at their

(1) Law Rep. 7 Eq. 532.

H. L. (I.) 1885 WAKEFIELD v. MAFFET. Lord Blackburn.

full age of twenty-one years or day or days of marriage, whichever shall first happen"—I leave out the parenthesis about the marriage of the daughters being with consent during minority—"with interest for the same by way of maintenance at the rate of £6 by the hundred, to be computed from the day of the death of the survivor of them the said T. C. Wakefield and M. A. Wilcocks;" plainly shewing that those who drew the settlement remembered and were quite aware of the fact that the money was not distributable until the death of the survivor of the intended husband and wife. Then it goes on, "with benefit of survivorship to the survivor or survivors of such children if any of such children shall die before his, her, or their share or shares shall become payable." If it had stopped there, there could not have been a doubt upon it that "payable" would have meant "shall become vested whether the time for distribution has come or not." Then come the words "unmarried and without leaving issue as aforesaid," and the question, and as it seems to me the only question, is, Have these words such a meaning as to shew that there is something which prevents the words "paid" and "payable" being construed not in their primary meaning, but in the meaning which I have already mentioned? It seems to me that there is nothing. If you could construe these words as Mr. Wakefield endeavoured to construe them, namely, to mean this, that a son or daughter may if they marry make a settlement in favour of their wife or husband or in favour of their children, I think that that would not quite do. If he could have made out that "unmarried and without leaving issue as aforesaid," amounted by implication to saying that it might be left to the widow if there was a widow and to the children of the deceased child if the case happened, then that would have brought it within the reasoning of the cases which have been cited. But I am unable to see how you are to put upon those words such a very strong construction as that. I do not see how you can do it; neither did the Court below see how they could do it. If we are now to be asked, What other meaning do you put upon the words? I acknowledge that I agree in thinking that the draftsman who drew this settlement (there are plenty of other indications of it) had not a very clear head, nor did he use words with a very discriminating sense of the way in which they should be arranged

and placed. But what did he mean by this expression? I can hardly imagine that he was thinking of the possible case, no doubt, of a son not attaining the age of twenty-one, say being nineteen, marrying and then dying before attaining the age of twenty-one, leaving a widow or children. I hardly think that he would be having that on his mind—it is not a very likely case to have happened. Could he have been thinking of the case of saying that though a son or a daughter had attained the time when the money was payable, yet after that if the son or the daughter who had attained the age had married, it should be so far settled that he or she could do nothing with it,—that is to say, that he might leave it and might settle his share which had become vested in that way, but should not settle it except upon the widow or except upon issue? That is a meaning which Mr. Wakefield tries to put upon those words, but I cannot imagine that the draftsman was thinking of that when he put in those words, and I am quite clear that he has not expressed it. If he had expressed it, it would have gone a good way towards saying that the object and reason why those words should have the suggested meaning put upon them being, that it was very desirable that when the son had attained the age of twenty-one he should then be able to make a settlement of his portion, to dispose of it either by selling it or mortgaging it or settling it as seemed to him good—there would probably have been ground, or at least it would have raised a very plausible ground, for saying that the word "payable" is not to be understood in the sense which I have indicated. But it is impossible to put that meaning upon the words which are used. Mr. Wakefield seems to have thought that because the Court below were of opinion that, used as they are in this place, the words "unmarried and without leaving issue as aforesaid" were not intelligible and sensible and the Court gave them no effect at all, they ought to have given them the effect of saying that the second son, Thomas Haughton Wakefield, who did live to be above twenty-one and did die unmarried and without issue, could not possibly be entitled to have the property vested in him, seeing that he died before his father, and that therefore there was something unauthorized by the settlement in his leaving it to his father. I think that it is no better because he left it to his father

H. L. (I.) 1885 WAKEFIELD v. MAFFET. Lord Blackburn.

than if he had left it to anybody else, but I am utterly unable to see that there is any ground for saying that it is contrary to the settlement; and entertaining that view of the case I think that the judgment of the Court below ought to be affirmed and the appeal dismissed with costs, and I move your Lordships accordingly.

LORD WATSON:—

My Lords, the first question submitted for your Lordships' decision was this, whether Thomas Haughton Wakefield, who died on the 5th of June, 1861, was excepted from the class who were appointed to take the provision of £3000, by reason of his having become entitled in possession to the estate of Haughton? That question was not raised or discussed in the Court below, and now that it has been fully argued here I entertain no doubt that it must be answered in the negative. Thomas Haughton Wakefield was not excepted from the class who were to take, unless the estate of Haughton was "conveyed" or "meant to be conveyed" by the marriage contract of his parents, and unless he took that estate under the limitations contained in the marriage contract. But the marriage contract deals with nothing except the life interest of Mrs. Wakefield, his mother, in the Haughton estate; and her son Thomas took the fee of that estate under the will of his maternal great grandfather, and not under the limitations of the marriage contract or by virtue of its provisions.

The real question in the case therefore comes to be, to what period is the gift by survivorship to be referred—to the time when the fund was to be raised and distributed, or to the time when each child attained twenty-one, or, if a daughter, was married? The argument addressed to us has ranged over a very wide field. A great variety of propositions which are not in dispute have been established by a copious citation of authorities, and many questions of nicety have been elaborately discussed. In my opinion it is quite unnecessary to follow the argument through all its ramifications, because much of it had little bearing, and a great deal of it had no bearing, upon the question before us. That question lies, as the appellant said, in a nutshell, and depends upon the construction which is to be put

upon the gift of £3000 and the relative clause of survivorship in this marriage contract.

My Lords, the terms of the marriage contract which we have to construe appear to me to differ in no material respect from the terms of the settlement which was before Lord Hardwicke in *Emperor* v. *Rolfe* (1). In that case a sum of money was provided by a term after the mother's death for daughters' portions, to grow due and payable at twenty-one or marriage, and if any of them died before her portion became due and payable, it was to go to the survivors. That appears to me to be, in substance, the same provision which is made here in favour of the children of the marriage who are to participate in the gift of £3000. There is no gift to the issue of any one of the children who might happen to die before the time when the period for the distribution of the estate arrived. No such gift is made expressly to the issue of a child, and I am unable to spell an implied gift to them out of the somewhat confused language of the clause. So that if your Lordships were to hold the period of distribution to be the time for the clause of survivorship taking effect, the result would be that if a child predeceased that term leaving lawful issue of the class the survivors could not take his share, and his issue would not get it, as in the absence of a gift to them it would sink into the estate.

I entertain no doubt that *Emperor* v. *Rolfe* (1) is a binding authority in all cases whose circumstances are similar. In this case I think it is unnecessary for your Lordships to consider whether the principle of the judgment has or has not been carried too far in subsequent cases which were not similar in their circumstances.

In *Wilmott's Trusts* (2), and other cases where the Courts have refused to apply the doctrine of *Emperor* v. *Rolfe* (1), its authority has been invariably recognised, although it was held to be inapplicable. James V.C. distinguishes *Wilmott's Trusts* (2) from *Emperor* v. *Rolfe* (1) upon the very intelligible ground that in the latter case "the issue of children dying in the lifetime of the tenant for life were unprovided for," whereas in the case before him there was a direct gift to the issue of a child dying,

(1) 1 Ves. Sen. 208. (2) Law Rep. 7 Eq. 532.

H. L. (I.) 1885 WAKEFIELD v. MAFFAT.

which would "take effect upon the death of that child at any time during the lifetime of the tenant for life."

Being of opinion that the present case is ruled by *Emperor* v. *Rolfe* (1), I agree with your Lordships that the judgment appealed from ought to be affirmed and the appeal dismissed with costs.

LORD FITZGERALD:—

My Lords, the very clear, long, and remarkable address which we have heard from the appellant has failed to create any doubt on my mind as to the correctness of the decision in the Courts below. I cannot, however, concur in some of the observations of the judges in treating the question to be decided as one of extraordinary difficulty.

My Lords, I quite agree that it is unnecessary and inexpedient to follow the appellant in his citation of a cloud of cases many of which had no real bearing on the question for our decision. We have to ascertain the proper canon of construction, and having ascertained it to apply it to the case before us. It was urged on the part of the appellant that another question, which he evidently seemed to consider as the main or principal question in the cause, had been overlooked in the primary Court and also in the Court of Appeal. But no one who knows, as I do, the minute and conscientious care with which Sir Edward Sullivan examined all the cases which came before him could adopt the suggestion that an important question affecting the rights of the parties escaped his attention. In truth the particular question was not made on the pleadings or raised or discussed by counsel for the appellant in either of the Courts below. There was no foundation in fact for it and it did not at all arise. The only question raised below was whether on the true construction of the provision in the settlement the decease of Thomas Haughton Wakefield in the lifetime of his father extinguished his title to any portion of the £3000.

The primary Court decided that Thomas Haughton Wakefield took a vested interest on attaining twenty-one, which was not contingent on his surviving his parents and not defeated by his decease in the lifetime of his father. The Court of Appeal

(1) 1 Ves. Sen. 208.

affirmed the decision of the Master of the Rolls, and the sole question before your Lordships is whether that decision of the Court of Appeal is correct. The reasons given in the Court of Appeal by the Lord Chief Justice of Ireland and Lord Justice Barry are very clear and able, and I wish to express my entire concurrence in the views of those learned judges.

A long line of decisions has brought down to us from the time of Lord Hardwicke a rule of construction applicable to and which ought to guide us on such a question as that now before us. It is clearly and concisely stated in *Howgrave* v. *Cartier* (1), and adopted in a host of subsequent cases, from which I select *Perfect* v. *Curzon* (2) and *Swallow* v. *Binns* (3), not because the circumstances are exactly similar, but because the canon of construction is clearly restated and adopted. The passages to which I would refer, in *Perfect* v. *Curzon* (2) in the judgment of the Vice-Chancellor of England, and in *Swallow* v. *Binns* (3) in the judgment of Wood V.C., have been stated either in the course of the argument or in the Court of Appeal, and it is unnecessary that I should take up time by now reading them.

The rule, then, being, that in the construction of a settlement such as that before us there is a presumption or an implication that the settlor providing for his unborn children intended that according to ordinary practice their portions should become vested at twenty-one or marriage, we have to examine and see whether there is to be found in this settlement any clear language evidencing an intention to depart from this practice and make the right of the child contingent upon his surviving both parents. Let us look, then, at the provision now under consideration. I do not intend to repeat it, it has been already read. The language of the provision down to what has been called the "survivorship clause" clearly indicates the intention which the law presumes in the absence of unequivocal language to the contrary. The share of each son should there be taken primâ facie to be vested on his attaining twenty-one and then payable, though the period of actual payment could not be accelerated without the consent of the tenants for life to whom the then present income belonged.

(1) 3 Ves. & B. 79. (2) 5 Madd. 442.
(3) 1 K. & J. 417.

H. L. (I.) 1885 WAKEFIELD v. MAFFET. Lord FitzGerald.

When we come to the clause of survivorship it seems to me that the same interpretation must be put upon the words "shall become payable" as upon the words in the preceding passage "to be paid to him or them." The survivorship clause as to sons would then read "if any such son shall die before his share shall become payable as aforesaid," that is to say before he shall arrive at the full age of twenty-one years. Then follows the expression "unmarried as aforesaid," but that has no meaning as to sons, as there is no preceding provision at all relating to the marriage of sons, it is confined to daughters; and then we come to the words "and without leaving issue as aforesaid." These words have no application to anything which precedes them, and it has been well remarked that there is no gift, by implication or otherwise, to the issue.

It is to be observed that in this survivorship clause, ambiguous and equivocal as it is, and attended, no doubt, with some difficulty, there is not a word importing with any degree of clearness that the vesting of the shares depended on the children surviving their parents, or indicating an intention that a son who attained twenty-one or a daughter who attained that age or married under that age with consent, should lose his or her rights in the event of not surviving both parents.

As to *Willmott's Trusts* (1), which has been so much relied upon, it does not appear to trench on the authority of *Emperor* v. *Rolfe* (2), and on the contrary adopts the rule of construction expressed by Lord Hardwicke, and in a very remarkable way. It was pressed on the consideration of James V.C.: he says, "That being my clear opinion," upon the settlement, "the only question is whether I am bound by the authority of *Emperor* v. *Rolfe* (2) to give an artificial meaning to language of this kind occurring in a marriage settlement. The case of *Emperor* v. *Rolfe* (2) originally established the strong and unrebuttable presumption that in marriage settlements the shares of children are intended to become vested when they are wanted; that is to say in the case of sons at twenty-one and of daughters at twenty-one or marriage; and it certainly would require very strong language indeed to shew that any other construction than this would be consistent with 'the

(1) Law Rep. 7 Eq. 532. (2) 1 Ves. Sen. 208.

truth and honour' of the settlement." That is Vice-Chancellor James's criticism on *Emperor* v. *Rolfe* (1). He then goes on to distinguish the case before him on grounds very strong in his judgment, and upon the language of the settlement, from *Emperor* v. *Rolfe* (1), and he adds: "It seems to me therefore that the principle of *Emperor* v. *Rolfe* (1) does not apply to this case," that is the case before him. In conclusion he says: "Endeavouring to give effect to every word of this settlement, I think that this is one of those cases in which the intention of the settlor is so clearly expressed as to relieve me from the necessity of resorting to a rule of construction by which I should otherwise feel myself bound." So far, then, from straining at *Emperor* v. *Rolfe* (1) James V.-C. adopts it and uses the strong words "unrebuttable presumption," and does not at all trench upon the authority of that decision.

We do not intend to put any construction on this settlement contrary to the obvious or natural meaning of the language which the settlor has used. We put no strained or artificial meaning on any part of the provision, and on the contrary we give effect to all that is clear and unambiguous.

I am therefore of opinion that the decision of the Court of Appeal should be affirmed.

Order appealed against affirmed; and appeal dismissed with costs.

Lords' Journals 18th May 1885.

Solicitors for appellant: *Charles J. Guy & Co. for Arthur L. Barlee, Dublin.*

Solicitors for respondents: *W. W. Wynne & Son for Thomas Carey, Dublin and Newry.*

(1) 1 Ves. Sen. 208.

[HOUSE OF LORDS.]

H. L. (E.) 1885 *July* 14.

WILLIAM HARRISON LAST (Surveyor of Taxes) . . . . . } Appellant;

AND

THE LONDON ASSURANCE CORPORATION . . . . . } Respondents.

Revenue, Inland—Income Tax—Insurance Company, Life—Bonuses to participating Policy-holders—"Annual Profits or Gains"—"Dividend"—5 & 6 Vict. c. 35, s. 54.

A life insurance company issued "participating policies" at an increased premium, according to the terms of which at the end of each quinquennial period "the gross profits" of such policies were thus dealt with: two thirds were returned by way of bonus or abatement of premiums to the holders of such policies then in force: the remaining third went to the company who bore the whole expenses of the business, the portion remaining after payment of expenses constituting the only profit available for division among the shareholders:—

Held, reversing the decision of the Court of Appeal, by Lords Blackburn and FitzGerald, Lord Bramwell dissenting, that the two-thirds returned to the policy-holders were "annual profits or gains" and assessable to income tax.

APPEAL from an order of the Court of Appeal (1).

The facts appearing in a case stated by the Income Tax Commissioners are fully set out in the report of the decision of the Queen's Bench Division (2).

That part of the case which was material to this report was as follows:—

The respondents in the life branch of their insurance business issued "participating policies" at an increased premium, according to the terms of which at the end of each quinquennial period any surplus of the funds applicable to such policies was thus dealt with:—two-thirds were returned to the policy-holders by way of bonus or abatement of premiums: the remaining third went to the company who bore the whole expenses of the business, the portion remaining after payment of expenses constituting the only profit available for division among the shareholders.

(1) 14 Q. B. D. 239. (2) 12 Q. B. D. 389.

The printed accounts for the years 1876, 1877 and 1878 (which formed part of the case) contained items under the head "Portion of profits appropriated to shareholders as per profit and loss account."

The Queen's Bench Division (Day J., Smith J. dissenting) held that the sums payable to the participating policy-holders were not profits or gains of the company assessable to income tax (1). The Court of Appeal (Brett M.R. and Cotton L.J., Lindley L.J. dissenting) affirmed this decision.

The only question raised on the present appeal was whether the sums so payable to participating policy-holders were liable to income tax.

During the argument their Lordships asked to see the respondents' prospectus. That for 1880 was handed in. It contained tables of premiums both "with" and "without participation of profits;" and also the following clauses:—

"The bonus to the assured is increased owing to the arrangement by which, in consideration of a fixed percentage of the *gross* profits of the life assurance business, the corporation bears all the expenses of management."

"Division of profits:—

"Two thirds of the gross profits of the participating series of policies are allotted every five years to the assured, every policy in force at the date of the valuation being entitled to participate. The assured have the option of receiving their share of the profits in cash, or of appropriating it in increase of the sum assured or in reduction of the future annual premiums."

June 8. Sir *H. James* A.G. and *A. V. Dicey* for the appellant:—

The question is what are the "profits" of the life insurance business? The appellant's contention is that the sums paid to policy-holders in the shape of bonuses were assessable income or revenue: the respondents contend that the only profit of the corporation available for division among the shareholders is the surplus that remains after paying the bonuses and the expenses of the business, and that this is all that is liable to income tax.

(1) 12 Q. B. D. 389.

H. L. (E.) 1885 LAST v. LONDON ASSURANCE CORPORATION.

"Profit" is the excess of receipts over expenditure. The fact that this surplus is applied in any particular way does not make it cease to be profit. The only question is whether the part of the surplus devoted to the policy-holders is to be considered as profit. The tax is levied under Schedule D of 16 & 17 Vict. c. 34, and the rules are in 5 & 6 Vict. c. 35 s. 100, and the concern brings in a profit to somebody. The respondents' own accounts specify the "portion of *profits* appropriated to shareholders." Under the Income Tax Acts receipts are taken to be profits though they might not be regarded as profits by men of business: *Mersey Docks* v. *Lucas* (1). Whether the appropriation is under contract, as in this case, or by statute, as in that, makes no difference, and the motive of the appropriation cannot alter the character of the surplus. The test is this: if there is an expenditure which would be made in any case, from which profits may accrue, that expenditure should be deducted; but an expenditure which will not be incurred unless there is a profit is not an expenditure in order to earn a profit.

[LORD BRAMWELL:—If your contention is right the participating policies are more profitable than the others; for the premium is higher, and you say that the bonus is not an additional expense.]

The profits are not only made from the premiums but in other ways, for instance from investments. A percentage of profit paid to a workman is to induce him to do work by which the profit is made.

Sir *H. Giffard* Q.C. and *Arthur Charles* Q.C. (*A. P. Stone* with them) for the respondents:—

The policy-holder is not a co-adventurer. If a book is published on the system of "half profits" the publisher only pays income tax on the half. The "surplus," of which a share is paid to the participating policy-holder, is not (correctly speaking) a "profit" of the company, and the word "profits" in the prospectus is not used in the sense of "net profits." It is merely used to describe a fund which, subject to certain deductions, is to serve

(1) 8 App. Cas. 891.

as a measure of payment to the policy-holders. The consideration for the increased premium is twofold, a fixed payment on the death of the policy-holder and another payment contingent on the amount of the surplus.

[LORD BLACKBURN:—The question is, for what does the participating policy-holder pay the higher premium. Is there not an agreement to pay him a share of the profits?]

The higher premiums create a fund which, by contract, is to be given back to the policy-holders. The company are bound to pay the bonus, by virtue of their contract, for the purpose of earning the fund, as was put by Day J. in his judgment in the Court below.

Dicey, in reply:—

A deposit account at a bank shews the difference between interest and a share of profits. The question is not What is the consideration for the payment? but, What is the fund from which the payment is made?

[He also referred to 5 & 6 Vict. c. 35 s. 102.]

The House took time for consideration.

July 14. LORD BLACKBURN:—

My Lords, the appellant is a surveyor of taxes. He appeals against an order of the Court of Appeal, confirming an order of the Queen's Bench Division made on the 14th day of March 1884. That order is as follows:—"Whereas in pursuance of the 9th section of the 'Customs and Inland Revenue Act 1874,' a case had been stated, at the request of the above appellant, for the opinion of this Court by the Commissioners for the general purposes of the Income Tax Acts for the city of London, and whereas the said case came on to be heard on the 13th day of March instant, when upon reading the same, and hearing Sir Henry James, Knight, her Majesty's Attorney-General, for the appellant, and Sir Hardinge Giffard, Knight, Q.C., for the respondents, and the said Attorney-General in reply, the matter was adjourned for judgment until this day. Now the Court are of opinion that the decision of the said Commissioners discharg-

H. L. (E.) 1885 LAST v. LONDON ASSURANCE CORPORATION. Lord Blackburn.

ing the assessment made upon the respondents is correct, and affirm the determination of the said Commissioners, and do order that the costs of said respondents of this appeal be paid to them by the said appellant. And it is hereby referred to the Queen's Remembrancer to tax such costs."

By 37 Vict. c. 16 s. 10 it is required that "the Court shall determine the question or questions of law arising on a case transmitted under this Act, and shall thereupon reverse, affirm, or amend the determination in respect of which the case has been stated, or remit the matter to the Commissioners with the opinion of the Court thereon, or may make such other order in relation to the matter, and may make such order as to costs as to the Court may seem fit."

The appeal from the Queen's Bench Division to the Court of Appeal, and from the Court of Appeal to this House, was intended to raise one question only. The case as stated under 37 Vict. c. 16 by the Commissioners for the general purposes of the Income Tax Acts for the city of London I may, I think, say is not, without explanations and additional information, to me at least intelligible. But the appellant, the surveyor of taxes, who in this case represents the Crown, and the London Assurance Company, did furnish such explanations and information to the Queen's Bench Division as enabled the learned judges to think that they understood what were the questions of law arising, or at least intended to be raised on the case. These were, in the opinion of the Court, four; on three of them the two judges agreed, and on those there has been no appeal, and this House has nothing now to do with them. But on the fourth question the two judges differed. They both, I think, agreed that if the corporation was liable to pay income tax on only one-third of the sum ascertained quinquennially as being the profits during that five years, which was divisible among the shareholders, the decision of the Commissioners was right and should be affirmed; but that if the two-thirds which were distributable amongst the holders of policies with participation of profits, whose policies were at that time still in force, were to be treated as part of the profits for which the corporation were liable to be assessed, the decision of the Commissioners was not right. Smith J., as being the junior judge,

withdrew his opinion, and the order of the 14th of March 1884 was made.

I think on the appeal to the Court of Appeal, and also on the appeal to this House, it must be taken as agreed by both parties that this was the only question. And I think it must also be taken as agreed by both parties, that a scale of premiums is in force, supposed by the corporation to be such as persons desirous of insuring their lives would be likely to accept, which were such that the corporation, if getting a sufficiently large number of policies to make the average of lives dropping in each year pretty constant, would expect to make a fair profit; and a higher scale of premiums was also in force on which policies were issued "with participation of profits."

If the ordinary premiums were such as to lead to an expectation of a fair profit, the higher scale of premiums would lead to the expectation of a large profit. But no one who could insure at the lower rate would insure at the higher rate unless he got some inducement to do so. And I think we must take it as agreed by both parties, that the bargain (so made as to be binding on the corporation, and enforceable against them by those who took participating policies) was that the holders of such participating policies as were in force at the quinquennial period should have paid to them two-thirds of the profits made during the five years on this class of participating policies. Each individual policy-holder who thus acquired a right enforceable at law has an option to take his part in cash or in some other way. I do not think that material. The corporation keeps only one-third.

The inducement for the corporation to agree to take only one-third is, I think, obvious. They receive premiums on this high scale during the five years, and, unless some very unusual mortality occurs amongst their participating policy-holders, will receive a large profit. They cannot be called upon to make any payment to the policy-holders unless there is a profit, and therefore, being in all probability secure against loss from making this payment, may very reasonably prefer a smaller share of the large profit which is expected on policies of this class to the whole profit on ordinary policies on which there might be a loss.

H. L. (E.)
1885
LAST
v.
LONDON ASSURANCE CORPORATION.
Lord Blackburn.

A person who is about to take out a policy may, if he is of the age of twenty next birthday, insure, according to the tables of the corporation, £100 for his whole life, without participation in profits, at the annual premium of £1 13*s.* 2*d.* He may, if he prefers it, insure the same sum, with participation in profits, for a premium of £1 19*s.* 10*d.* or 6*s.* 8*d.* more. What has he by the bargain stipulated he shall have in consideration of this extra 6*s.* 8*d.*? If he dies before the quinquennial period arrives he gets nothing; but if his policy is still in force he has, I cannot but think, purchased a share in the profits, if any, earned during those five years. If there are no profits he gets nothing. If this is the right view of the case, income tax is payable by the corporation on those profits, whatever they may be bound to do with the profits. Not only has this been decided, I think, by this House in the *Mersey Docks* v. *Lucas* (1) but it seems to me expressly enacted by 5 & 6 Vict. c. 35 s. 54, which requires the estimate of the profits of a corporation to be made "before any dividend shall have been made thereof to any other persons having any share, right, or title in or to such profits."

Cotton L.J. says, indeed, that "the word 'dividend' clearly, in my opinion, means what is to be divided between those who claim it not by their contract with the company but by their position as shareholders." I have great respect for the judgment of Cotton L.J., but he gives no reason for this construction of the enactment, and I can see none. I feel bound to say that I do not agree in it. I think if the policy-holders have purchased a share in the profits, they are persons having a right to a share in the profits; but the great question is whether what the policy-holders are entitled to is a part of the profits. The three judges below, from whom I differ, have thought that what was by the bargain to be given to the shareholders was not a share of the profits, but an expense necessarily incurred in order to earn the premiums and therefore to be deducted before the profits could be ascertained.

I have been unable to agree with this opinion. The Master of the Rolls seems to think that in estimating the profits of a business you must always, as he words it, "consider the share-

(1) 8 App. Cas. 891.

holders and the customers in antithesis." As I understand this figurative expression, he seems to think that whatever is by the bargain to be given to the customer must be an expense preliminary to the earning of profit, and cannot be itself a part of the profit. I rather think it was from (I cannot but think hastily) assenting to this position that Cotton L.J. put the construction from which I have dissented on 5 & 6 Vict. c. 35 s. 54. I agree that many things which by bargain are to be given to a customer are really expenses incurred to earn the profit; and I think it would make no difference if by mistake they were called profits. For instance, I should not hesitate to say that if the bargain was that whenever a policy-holder had paid premiums for five years, the extra premiums (that is, in the case of the life of twenty, the six shillings and eightpences) paid by him, or some part of them, should be returned, that could in no way be a share in the profits. It would be returned whether there were profit or not. But I cannot agree in what seems to run through the judgments of all three judges from whom I differ, namely, that no share in profits can by bargain be given by a company to anyone who is not a shareholder.

I believe that the majority of your Lordships agree with me, and I therefore move that the order appealed against should be reversed, and the order of the 14th of March 1884 varied by remitting the case to the Commissioners, with a direction that the profits of the life branch should be calculated on the principle, that whatever profit was made should be assessed, though the corporation had bound themselves to pay it, or a part of it, to the policy-holders whose policies were still in force at the quinquennial period; and also that the order of the 14th of March should be varied by giving no costs to the respondents in the Court below. And I think that the appellant in this case should have the costs in the appeal from the Queen's Bench Division to this House.

LORD BRAMWELL:—

My Lords, I am of opinion that this judgment should be affirmed.

Income tax is payable by the respondents on their profits, and the question is, what are those profits? The profits of a business

H. L. (E.)
1885
LAST
v.
LONDON ASSURANCE CORPORATION.
Lord Bramwell.

are what remains, if anything, after deducting all outgoings from all income. Of course in outgoings many things must be included which that word inadequately describes, but the consideration of which is immaterial to the question before us. If profits are made in the business which the proprietors choose to give away, they must nevertheless pay income tax on them. But if, in order to earn what would otherwise be net profits, they are put to expense, or liability to expense, which must be deducted from what is called gross profit, then they are liable only in respect of what remains after deducting such expense or liability. Take the common case of a commission payable to the person who brings business to the insurance company; before the profits of the company can be fixed, his commission must be deducted. In short, it may be said that income tax is payable on that which is divisible among the shareholders.

The fallacy in the argument of the Crown arises from the inaccurate, though practically convenient, use of the word "profits," as meaning the gross profits, i.e., profits without deduction of outgoings. As Jessel M.R. said, "There is no such thing as 'gross profits.'" If the expression had been not "participation in profits," but "a return or benefit equal to two-thirds of what would be profits but for the obligation to make such return or benefit," there would not be the least ground for the claim even in appearance.

Let us see what is the difference between the two classes of insurance, the participating and non-participating. The ordinary insured, i.e., the one not entitled to any return or benefit beyond the sum insured, pays at fixed intervals during his life a sum which, it is calculated, if laid out at compound interest, will produce such a sum as after paying expenses and the sum insured, will leave a fair profit to the shareholders.

The insured entitled to a return of premium or benefit beyond the sum insured does precisely the same thing. He pays at fixed intervals during his life a sum which it is calculated, if laid out at compound interest, will produce such a sum as, after paying expenses and the sum insured, and two thirds of what, but for the obligation to pay it, would all go to the shareholders, will leave a fair profit to them.

It seems to me that the case may be demonstrated thus: it

cannot be said that, where a sum is added to the policy or the future premium is diminished, there is a profit to the insurers, unless it can be said that there is such profit where money in ready cash is paid to the insured. Now is there such a profit to the insurers where cash is returned to the insured? I say, clearly not. Suppose a bargain was made with the insured thus: You shall pay such and such a premium, and if we want money to pay our liabilities and make a profit divisible among shareholders, you shall pay so much more. In that case, would the insurers be making a profit, the amount of which would include the amount of the additional obligation of such insured? Certainly not. But there is no difference between that case and the case of those who are to have some return of premium made or benefit given, save that in the latter case the insured trusts the insurers to make the return, while in the former the insurers would trust the insured to make the payment, which of course would be less convenient. In such a case as I have supposed, the insured would pay less at the outset than the premium in the case where there is to be no return or benefit beyond the sum insured. He would do so because in certain events he would be liable to pay more. As it is, where he is to have that contingent return or benefit he pays more because he is to have it. Take the two cases. A. pays £2 a year to insure £100, and he and the insurers agree that, if they do not want all of it to pay outgoings and leave them a profit, they will return him 10*s.* a year. B. pays 30*s.* a year to insure £100, and he and the insurers agree that if the insurers want it to pay expenses and leave a profit, he will pay another 10*s.* a year. What is the difference between the two cases? But, if in the latter case the liability to pay 10*s.* is not part of the profits, how in the former is the receipt of the 10*s.* with the liability to return it? The "profits" are calculated quinquenially and not annually on account of the trouble and expense of the calculation, but suppose they were calculated annually and an annual return made to the insured, could it then be said that the sum so returned was part of the annual profits?

No doubt the insured, who is to have a return of premium or bonus, is interested in the prosperity of the business. But that is not the question. The question is, what are the profits of the

H. L. (E.) 1885 LAST v LONDON ASSURANCE CORPORATION. Lord Bramwell.

company? The insured, who in the case I have put would have to pay a further premium, would be interested in the profits of the company, but certainly his liability to pay would not be counted in the profits. Nor does the insured make a profit if he has this bonus or return of premium. If he has a return of premium, his insurance costs him less than it would otherwise. If a bonus is added to his policy, he has a larger sum insured than he had before, a contingency for which he bargained when he insured. But, further, the question is not whether the insured has made a profit, but again, whether the insurers have. On a marine insurance the insured may receive more than his loss. That does not shew profit in the company.

As I have said, the whole difficulty, the very existence of the question, has arisen from the inaccurate use of the expression "participation in profits," instead of "participation in the sum that would be profits but for the right to participate."

The matter may be illustrated thus: If the Crown is right, who will pay the income tax on the whole three-thirds? The shareholders? If so, they would pay on profits they do not receive. The participating assured? Then they would pay income tax on something which is not within the Income Tax Act.

The question is very important. As far as insurance companies are concerned, all they will have to do will be to alter their language. But if the contention of the Crown is right, income tax will be payable in all cases in which employers have agreed with employed that, besides fixed wages, the employed shall receive what is called a share of the profits. The income tax will apply to co-operative societies strictly so called, and be payable on a sum falsely called profits, with no deduction of the wages contingently payable to workmen, if gross profits enable them to be paid. This Mr. Dicey in effect admitted. I think it would be most disastrous, and most unreasonable. As much so as if a man gave £1 to a fisherman to go fishing, and a tenth of the fish, or a tenth of what remained of the price of the fish after deducting for the boat, &c., and then was charged to the income tax without deduction for the fish given or allowance made to the fisherman.

I cannot truthfully say I have the least doubt in this case,

except that which arises from my respect for the opinions of other noble and learned Lords.

LORD FITZGERALD :—

My Lords, I should have found it very difficult to eliminate from the case stated the question for your Lordships' decision if it had not been for the light afforded by the judgments in the Divisional Court and Court of Appeal. It was admitted, as I understand, in the course of the argument that your Lordships' decision on the one question before you must largely, if not entirely, depend on your Lordships' interpretation of the contract between the company and the holders of policies of the participating series. The participating policy is in the ordinary form with nothing to indicate its special character, but the true agreement is to be found in the printed prospectus of the company under the head of "life department." "Division of *profits. Two-thirds of the gross* profits of the participating series of policies are allotted every five years to the assured, every policy in force at the date of the valuation being entitled to participate. The assured have the option of receiving their share *of the profits* in cash, or of appropriating it in increase of the sum assured, or in reduction of the future annual premiums." In the preceding page of the prospectus, but under the same heading, the following passage occurs :—"The bonus to the assured is increased owing to the arrangement by which, in consideration of a fixed percentage of the *gross* profits of the life assurance business, the corporation bears all the expenses of management."

I am not to be understood as resting my judgment on the use of the term "profits," though it is not to be put out of consideration, but I had rather examine into the substance and reality of the agreement. It would be difficult to arrive at a construction of this portion of the prospectus without some extraneous aid; but it has been assumed in the argument that the participating policy entitled to a share in two-thirds of the gross profits at the time of the quinquennial distribution must be then in full force and have been so for the preceding five years. If it has lapsed or from any other cause, as for instance the death of the assured, has come to an end within that period, there is no claim to

H. L. (E.) 1885 LAST v. LONDON ASSURANCE CORPORATION. Lord FitzGerald.

participation; and if it has not reached five years of age the holder must wait for the distribution at the end of his first term of five years. The question is whether the company is liable to pay income tax in respect of that portion of its annual receipts which it designates as "two-thirds of gross profits" and quinquennially allocates to the participating policy-holders who at each distribution may come within the terms of the prospectus. I have been unable to reach the elements which are taken into the calculations of the company for the purpose of ascertaining what is termed the "two-thirds of gross profits" at each quinquennial allocation. The amount varies, and on the first example given in the prospectus it would seem that it necessarily varies according to the mode in which the benefit is claimed by the recipient; thus, in the example so given, if he claims to have his share added to his policy the accretion may amount to £66 8*s.*, being two-thirds of what he has paid during the five years, but if taken in cash the bonus in cash is but £24 17*s.* That example I presume represents a period without exceptional loss. But it may be that the losses are such as to extinguish profit on the five years, and there could then be no allotment, or to reduce the profits and the allotment accordingly. It does not represent any proportion of the actual receipts from this class of the company's customers though it may approximate to it. 16 & 17 Vict. c. 34, sched. D. imposes income tax on "the annual profits or gains arising or accruing to any person from any profession, trade, employment, or vocation." We are bound to adopt the interpretation put on "profits" in the *Mersey Docks* v. *Lucas* (1), that the expression means "the incomings of the concern after deducting the expenses of earning them" or "income of whatever character it may be over and above the costs and expenses of receipt and collection," and that "the gains of a trade are what is gained by the trading for whatever purpose it is used." On looking again at the prospectus, page 4, where the income of the company is given for the year 1880, it will be found that under the head of "income for 1880" the first item is "life premiums £149,160 1*s.*," in which no doubt the whole sum received in respect of life policies, including the participating series, is put down as annual income.

(1) 8 App. Cas. 891, 903, 904, 905, 912.

H. L. (E.)
1885
LAST
v.
LONDON ASSURANCE CORPORATION.
Lord FitzGerald.

The judgments of Day J. in the Divisional Court and of the majority of the Court of Appeal rest on the ground that the sums allotted to the participating policy-holders under the name of two-thirds of the gross profits for the quinquennial period are to be treated as an expenditure made to get the customers to come in, and not an annual profit chargeable with income tax under the Income Tax Acts. After careful consideration, and with every desire to reach the same conclusion, I have been wholly unable to do so. The premiums payable by the participating policy-holders come into the coffers of the company quarterly, half-yearly, or annually in ordinary course and form part of the annual income of the concern. When received those moneys are probably invested, the profit of the investment also forming a part of the income; and I cannot see that they the less form part of its annual income because at a subsequent period of time a part of the gross profits (if any) realised may be allotted to certain of the policy-holders. It seems to me, on the contrary, to be annual "income" after deducting the proper expenses of earning it, and subject to income tax notwithstanding its subsequent special destination. The prospect of a future participation in profits is held out as an inducement to customers to insure in the participating series, and probably has proved to be successful, but it seems to me to be a very forced interpretation of the contract and position of the parties to put it down as part of the expenses of making the income.

No one could truly say after the judgment of my noble and learned friend (Lord Bramwell) that the case is free from doubt. I agree with him that the question we have to decide is one of importance, but I am unable to follow him in thinking that the decision which your Lordships are arriving at is to produce the extensive results which he has pointed out.

The conclusion I have reached on the case as it comes before us, and not on any supposititious case, is that the premiums paid to the company in respect of the participating policies form part of the annual profits of the company just as much as any other portion of their revenue, and that the quinquennial allotments represent no return to the policy-holders of any aliquot proportion of the premiums they have paid, but do constitute what the

H. L. (E.) 1885

LAST v. LONDON ASSURANCE CORPORATION.

parties have correctly described as a participation in two-thirds of the gross profits, if any, realized in the quinquennial period.

Order appealed from reversed. Order of the Queen's Bench Division varied by remitting the case to the Commissioners, with a direction that the profits of the life branch should be calculated on the principle that whatever profit was made should be assessed, though the corporation had bound themselves to pay it, or a part of it, to the policy-holders whose policies were still in force at the quinquennial period, and by giving no costs to the respondents in the Queen's Bench Division; the appellant to have his costs in the appeal from the Queen's Bench Division to the Court of Appeal, and in the appeal to this House. Cause remitted to the Queen's Bench Division.

Lords' Journals 14th July 1885.

Solicitor for appellant: *Solicitor of Inland Revenue.*

Solicitors for respondents: *Collyer-Bristow, Withers, Russell, & Hill.*

[HOUSE OF LORDS.]

EWING AND OTHERS . . . . . APPELLANTS; H. L. (Sc.)

1885

AND *July* 24.

ORR EWING AND OTHERS . . . . . RESPONDENTS.

Estate of domiciled Scotch Testator—Jurisdiction, Conflict of—Trust Funds partly in Scotland partly in England—Power of Scotch Courts to sequestrate Estate and appoint Judicial Factor—Forum conveniens—Confirmation and Probate Act (21 & 22 *Vict. c.* 56), *s.* 12—*Treaty of Union*, 1706 (6 *Anne, c.* 11), *art.* 19.

A resident and domiciled Scotchman died leaving a trust disposition and settlement appointing six trustees; three were resident in Scotland, one being a Scotch member of parliament resided in Scotland when parliament was not sitting, and the other two were resident in England. The truster had a very large amount of personalty in Scotland as well as heritable estate; and a trifling amount of personal estate only in England. The trustees proved the trust deed in Scotland, and were confirmed as executors. They then had the Scotch probate sealed in accordance with 21 & 22 Vict. c. 56, s. 12, and thus became the personal representatives in England. They removed all but a small portion of the personalty in England into Scotland. A person resident in England, who was entitled to a share of a large legacy, and also to a share of the residue, brought an action in England to administer the estate. The trustees were served and entered an appearance. The plaintiff, an infant, in the English action moved for judgment for administration of the whole estate, and on the 29th of November, 1882, the Court of Appeal granted the order. The trustees lodged an appeal to this House. In June, 1883, the trustees carried certain accounts into Chambers in the English action. On the 5th of July, 1883, four of the residuary legatees commenced this action in Scotland against the trustees for, inter alia, declarator that the trustees were bound to administer the estate in Scotland, subject to the Scotch law and under the authority and jurisdiction of the Scottish Courts *alone:* and that they were not entitled to place the estate under the control of the English Court or any other foreign tribunal furth of Scotland, and for interdict; or, alternatively, to the conclusion for interdict for the removal of the trustees, for sequestration of the estate, the appointment of a judicial factor and for interdict until the estate should be vested in the judicial factor. On the 30th of November, 1883, this House affirmed the order of the Court of Appeal. On the 29th of February, 1884, the Court of Session granted an interlocutor finding in terms of the declaratory conclusions of the summons: sequestrating the estate, appointing a judicial factor and interdicting the

H. L. (Sc.)
1885
EWING
v.
ORR EWING.

trustees from removing any title deeds, &c. from Scotland, or accounting to any one otherwise than the judicial factor.

On appeal taken by order of the Court of Chancery in England:—

Held, that the decerniture in terms of the declaratory conclusions of the summons, which in effect affirms the exclusive competency of the Scottish jurisdiction, was not supported by statute nor authority; and, therefore, that part of the principal interlocutor and that part of the interdict relating to accounting must be reversed; but the remaining portion of the principal interlocutor and the others appealed from must be affirmed, because the Scotch Courts had (1) full jurisdiction to sequestrate the estate in Scotland—the persons of the trustees and the trust property being there—and to appoint a judicial factor; and (2), because in the circumstances and on the undertaking given as to the infant plaintiff becoming a party to the Scotch administration, a primâ facie case of convenience in favour of a judicial administration in Scotland had been made out.

Lord Cottenham in *Preston* v. *Melville* (2 Rob. App. 107) explained, and Lord Westbury in *Enohin* v. *Wylie* (10 H. L. C. 13) dissented from.

APPEAL from certain interlocutors of the Court of Session, Scotland. The facts of this case are so fully given in 22 Ch. Div. 456, and in the judgments, 9 App. Cas. 36, that a very short summary of them here is necessary.

John Orr Ewing died a domiciled Scotchman on the 15th of April, 1878, possessed of personal estate amounting to over £460,000. The whole of this personalty, except a sum of about £25,000, was in Scotland. By trust disposition dated the 17th of November, 1876, the deceased appointed the nominal appellants as his trustees and executors, and the respondents are four out of six residuary legatees. One residuary legatee died subsequent to the death of the testator, leaving a will appointing two of the appellants his executors. The sixth residuary legatee was an infant, and was the plaintiff in the English action mentioned below. Of the trustees, three were resident in Scotland, one, being a Scotch member of Parliament, was resident in Scotland when Parliament was not sitting, and the other two were resident in England. The trustees proved the trust disposition in Scotch form, and obtained confirmation from the Commissary of Dumbartonshire.

On the 25th of May, 1878, the appellants as executors caused the Scotch probate or confirmation to be sealed with the seal of the principal registry in England, in accordance with 21 & 22 Vict.

c. 56, ss. 9 & 12 (1). They then removed the whole funds in England, excepting a sum of about £2700 to Scotland.

There were no debts in England.

On the 25th of February, 1880, the English suit commenced, the various steps of which are narrated in 22 Ch. D. 456; it is therefore sufficient here to state that the Court of Appeal, at the instance of the infant plaintiff, Malcolm Hart Orr Ewing, who was resident in England, made an order on the 29th of November, 1882 (refusing an order of Manisty, J.), for administration, usual in form to orders then made in administration actions in England for the administration of the testator's estate.

On the 13th of March, 1883, the Court of Appeal refused to stay proceedings pending an appeal to this House. On the 4th of May, an order was made in Chambers by Chitty, J., after hearing the solicitors for the parties, including those for the respondents, authorizing the trustees inter alia to make certain payments to the residuary legatees. On the 22nd of June, 1883, and on the 25th of October, 1883, the trustees carried certain accounts into Chambers in the English action.

(1) The 9th section enacts that, "It shall be competent to include in the inventory of the personal estate and effects of any person who shall have died domiciled in Scotland, any personal estate or effects of the deceased situated in England or in Ireland, or both: provided that the person applying for confirmation shall satisfy the commissary, and that the commissary shall by his interlocutor find that the deceased died domiciled in Scotland, which interlocutor shall be conclusive evidence of the fact of domicil: provided also, that the value of such personal estate and effects situated in England or Ireland respectively shall be separately stated in such inventory, and such inventory shall be impressed with a stamp corresponding to the entire value of the estate and effects included therein, wheresoever situated in the United Kingdom."

Sect. 12 enacts that, "When any confirmation of the executor of a person who shall in manner aforesaid be found to have died domiciled in Scotland, which includes, besides the personal estate situated in Scotland, also personal estate situated in England, shall be produced in the principal Court of Probate in England, and a copy thereof deposited with the registrar, together with a certified copy of the interlocutor of the commissary finding that such deceased person died domiciled in Scotland, such confirmation shall be sealed with the seal of the said Court, and returned to the person producing the same, and shall thereafter have the like force and effect in England as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate."

H. L. (Sc.) 1885 EWING v. ORR EWING.

On the 5th of July, 1883, the respondents commenced this action against the appellants as trustees and executors, the infant plaintiff in the English action not being individually represented.

The declaratory conclusions of the respondents' summons were as follows:—

It ought and should be found and declared, that by virtue of said trust-disposition and settlement and relative codicils, and of said testament-testamentar, the defenders are bound, as trustees and executors foresaid, to uplift, receive, administer, and dispose of the whole estate and effects of the said deceased John Orr Ewing, and to give effect to, and carry out the purposes of his said trust-disposition and settlement and relative codicils in Scotland, and according to the law of Scotland, and under the authority and subject to the jurisdiction of the Scottish Courts *alone*: And farther it ought and should be found and declared by decree aforesaid, that the defenders, as trustees and executors foresaid, are not entitled to place the said estate and effects under the control of the Chancery Division of the High Court of Justice in England, or to administer the same under the directions of the said High Court of Justice in England, or any of the divisions thereof, or of any other foreign Court or tribunal furth of Scotland, and having no jurisdiction in Scotland, or to place the said estates and effects beyond the control of the Scottish Courts: And further it ought and should be found and declared, by decree foresaid, that the defenders, as trustees and executors foresaid, are bound to render just count and reckoning for their intromissions with said estate and effects, whenever the same shall be legally required in Scotland, and according to the law of Scotland, and under the authority and subject to the jurisdiction of the Scottish Courts alone; and that the said defenders are not bound nor entitled to render any accounts of the said estate and effects to the said High Court of Justice in England, or any of the divisions thereof, or to any other foreign tribunal furth of Scotland, and having no jurisdiction in Scotland; nor bound nor entitled to part with the custody of any of the title deeds, writs, or evidents of the said estate, or to deposit the same in the custody of any Court situated furth of Scotland, and having no jurisdiction in Scotland, or to place the same beyond the jurisdiction or control of the Courts of Scotland.

The relief sought by the summons as amended was as follows:—

The defenders ought and should be interdicted, prohibited, and discharged, by decree foresaid, from withdrawing and removing the said estate and effects, and any of the title deeds, writs, or evidents thereof furth of Scotland, and beyond the jurisdiction and control of the Scottish Courts, and from giving up the same, or any part thereof, to any person or persons to be so removed, or otherwise to be put beyond the custody and control of the said defenders and the said Courts of Scotland, or beyond the reach of any process or legal diligence competent to the pursuers and other beneficiaries interested in said estate and effects; and from rendering any account or accounts of the said estate to, or otherwise placing the administration thereof under, the authority and control of the said High Court of Justice in England, or of any tribunal or Court what-

soever other than the Courts of Scotland: or otherwise, and alternatively to the foresaid conclusion for interdict, and whether decree shall or shall not be pronounced, in terms of the declaratory conclusions before-written, our said Lords ought and should remove the defenders, the said William Ewing, Archibald Orr Ewing, James Ewing, William Ewing Gilmour, Henry Brock, and Alexander Bennett M'Grigor, from their said office of trust and executry: or otherwise, and whether the defenders shall or shall not be removed from their said office, our said Lords ought and should sequestrate the whole estate and effects of the said deceased John Orr Ewing, contained and enumerated in the inventory of his estate, recorded in the court books of the commissariat of Dumbarton, the 13th day of May, 1878, and appoint such person or persons as our said Lords shall think fit to be judicial factor thereon, with all the powers usual, competent, and necessary for carrying out the said trust, and for carrying into effect the will of the testator, and the purposes of his said trust disposition and settlement. And in the meantime, and until the said estate is vested in and fully taken possession of by the said judicial factor or said lords, should interdict, prohibit, and discharge the defenders in terms of the conclusion for interdict above written.

In their Condescendence (5) the pursuers stated inter alia that by the confirmation the defenders appellants received full power to uplift and receive, administer and dispose of the personal estate, grant discharges thereof, and if needful to pursue therefor, provided always that they should render just count and reckoning for their intromissions therewith, when legally required. The defenders were thus duly vested in the said estate.

(Cond. 6) That the pursuers were interested in preventing unnecessary expense in the carrying out of the administration, and that it was the duty of the defenders to carry out the administration in Scotland, and according to the law of Scotland and the procedure and authority of the Courts of Scotland. That the defenders were not entitled to devolve the duties of the administration upon any third parties, whether subject or not to the jurisdiction of the Courts of Scotland, and particularly, they were not entitled to devolve their duties upon any Court and tribunal outwith Scotland, and beyond the jurisdiction and authority of the Courts of Scotland.

It was believed (Cond. 11) that the defenders had taken steps to implement the order of the Court of Appeal of the 29th of November, 1882, and had lodged, and were in the course of lodging various accounts, with the officers of the said Court. It was also believed, that they had produced, or may be called on

H. L. (Sc.) 1885 EWING v. ORR EWING.

to produce, in the said Chancery Division of the High Court of Justice in England, along with the accounts, the various title deeds, &c., and therefore place them beyond the diligence otherwise competent to the pursuers, and they would tend to lessen, if not destroy, the value of their interest in the estate. And further, that the making up of these accounts and the production of the title deeds, &c., had caused, and will continue to cause great unnecessary expense to the said estate, and so tend to diminish the share thereof to which the pursuers were entitled. And further (Cond. 12) they believed that the defenders in pretended obedience to the administration order of the English Court, hold themselves not entitled to make any payment out of the estate until they shall first have obtained the authority of the said English Court, or some officer thereof.

In their answer to Condescendence 11, the defenders admitted that the production of the accounts would cause expense to the trust estate which ought otherwise be avoided. And in their answer to Condescendence 12, they admitted that while the order of the 29th of November, 1882, stood unreversed, they held themselves bound not to make any payments out of the trust estate without the authority of the English Court. And they explained that they had been from the beginning anxious to retain the administration of the trust estate in Scotland, as they conceived they had a right to do so, and as it appeared that administration in Scotland would be less expensive to the trust and more convenient to the beneficiaries and the defenders.

The pleas in law for pursuers were, inter alia :—

1. The said estate being entrusted to the defenders by the Courts of Scotland, to be administered by them in accordance with the law of Scotland, and the procedure of the Scottish Courts, the defenders are bound so to administer it, and are not entitled to devolve that duty upon any foreign tribunal, or to place the said estate, or its title deeds, writs, and evidents in the custody of any person or Court outwith Scotland, and not subject to the jurisdiction or control of the Scottish Courts.

2. The defenders having been nominated and appointed to their said office by the will of a domiciled Scotchman, and the said estate having been committed to their custody by and under the authority of the Courts of Scotland, to be administered by them in accordance with the testator's directions in Scotland, and in accordance with the laws of Scotland, and subject to the jurisdiction of the Scottish Courts, are guilty of breach of their duty in accounting for the

said estate, or giving or preparing to give accounts thereof to a foreign tribunal, and ought to be removed from their office as concluded for.

3. Generally in the circumstances, it is necessary for the due administration of the said trust, according to Scottish law and the procedure of the Scottish Courts, and the protection of the pursuers' rights and interests therein, to remove the said trustees, and sequestrate the said estate, and that a judicial factor be appointed upon the said trust estate, as concluded for.

The pursuers were allowed to add the following additional plea in law to the record on the lodging of the reclaiming note mentioned below:—

The action or cause in the Chancery Division of the High Court of Justice in England, in so far as the same relates to the estate of John Orr Ewing, situated in Scotland at the time of his death, being in violation of the XIXth Article of the Treaty of Union, all the proceedings therein, so far as relates to said estate, are null and void; and the defenders ought to be interdicted from complying with any orders pronounced by said Court in such action so far as regards said estate.

The pleas in law for defenders were inter alia as follows:—

2. Separatim, the pursuers' averments are irrelevant and insufficient to support the conclusions of the summons, as regards that portion of the trust estate which was situated in England at the commencement of the administration suit, and as regards those defenders who were resident there at that time.

3. Separatim, the pursuers' averments are insufficient to support the conclusions for removal of the defenders, sequestration of the trust, and the appointment of a factor.

4. The defenders having resisted the said order of the 29th of November, 1882, and having appealed against the same, are not liable to be interdicted or otherwise interfered with in their administration, pending the appeal.

5. The defenders being bound to obey the said order in the meantime, and the sure payment of the pursuers' legacies not being endangered, the defenders are entitled to absolvitor.

The defenders were allowed to add the following additional plea in law:—

"The decision of the House of Lords on the said appeal is conclusive of the question that the Chancery Division of the High Court of Justice had jurisdiction to pronounce the order complained of, at all events it is conclusive of that question for the purposes of the present case."

The following joint minute for the parties was lodged on the 24th of January, 1884:—

That the whole estate of the deceased John Orr Ewing, which was situated in England at the date of his death, amounting to £25,235 12*s.* 6*d.*, had been realized and remitted to Scotland; £22,535 or thereby having been remitted prior to the issuing of the writ in the administration suit on the 25th of February, 1880, and the balance, being £2700 or thereby, shortly thereafter.

They further stated that the defendants, in terms of an order of the Court of

H. L. (Sc.) 1885 EWING v. ORR EWING.

Chancery, dated the 4th of May, 1883, pronounced in the administration suit at the instance of Malcolm Hart Orr Ewing, of which order a copy is hereto annexed, remitted to England, and on the 20th of June, 1883, paid into the said Court of Chancery the sum of £25,384 2*s.* 11*d.* on account of capital, and the further sum of £8039 2*s.* 11*d.* on account of income, on behalf of the said Malcolm Hart Orr Ewing, in respect of his interest in the estate of the deceased John Orr Ewing, conform to the two official receipts by the Paymaster-General, of which copies are also hereto annexed.

The action in Scotland came on to be argued on the 23rd of October, 1883, and on the 15th of December, 1883, after the decision of this House of the 30th of November, 1883, in the English action, the Lord Ordinary (1) pronounced an interlocutor in favour of the pursuers, and almost similar to that pronounced at a later date by the First Division (2).

(1) Lord Fraser.

(2) LORD FRASER, after stating the facts, continued :—

The whole funds are in Scotland, four of the executors are domiciled Scotchmen, and the trust-disposition is a deed in the form of Scotch conveyancing. It was therefore not surprising that the executors determined to resist these proceedings in Chancery, and accordingly pleaded that they were incompetent, or, at all events, inexpedient, and therefore ought not to be allowed. But the Appeal Court in England, and the House of Lords, who affirmed their deliverance, have held that by the practice of the English Court of Chancery the executors must comply with the order, not merely as regards the £25,000 that were in England at the testator's death, but also with the whole of the Scottish funds that never were in England at all, which are included in the Scottish confirmation, and which were only ingathered in consequence of that Scottish confirmation. It is said that this is the settled practice of that Court, and must be upheld, however inconvenient and however expensive it may be. Lord Blackburn suggests as the only remedy, two courses (see 9 App. Cas. at p. 48)—one the alteration of the Chancery practice, the other the intervention of the legislature. The pursuers have thought that there is another mode of remedying the grievance of which they complain, and that is by the present action. It has various conclusions, but the important one is the conclusion for interdict against the executors removing the estate or the title deeds and writs from beyond the jurisdiction and control of the Scottish Courts, and from rendering any account of the estate to, or otherwise placing the administration of it under the authority of the High Court of Justice in England. If decree be pronounced in terms of this conclusion, there is an immediate collision between the Courts of the two countries, and it is therefore necessary precisely to see how this matter is dealt with, as a point of international law, in other countries than England, by the Courts of civilised nations.

It is perfectly clear that if the practice of the Court of Chancery in England is inconsistent with international law, no Court of a foreign country is bound to respect it. When this case was before the Appeal Court, the late Master of the Rolls (see 22 Ch. D. at p. 464) stated that it was an error to consider Scotland in this ques-

On the 29th of February, 1884, the First Division recalled in form the Lord Ordinary's interlocutor, and pronounced an interlocutor (1) as follows:—

tion as a foreign country. He described it as a foreign jurisdiction. He was a very learned judge in regard to the law of England, but he obviously knew little of the law of Scotland, or of Scottish history, and his opinion, so far as he touches upon this matter, does not represent him fairly. He adverted to the fact that the judgments of the English Courts could be enforced in Scotland, and vice versâ; and that in regard to any other foreign country, there was a difficulty in ascertaining what its law was, which did not exist in reference to Scotland and England, seeing that a case might be sent by the Supreme Court of the one country for the opinion of the Supreme Court of the other. This is, no doubt, all quite true, but all these convenient arrangements—the suggestion of which came from Scottish lawyers—did not arise from the union between the two kingdoms. Until recent days the judgments of English Courts could no more be enforced in Scotland than those of the Courts of France. This was effected simply by an Act of Parliament for the convenience of the people of both countries. And so also it was by Act of Parliament that the practical way of ascertaining the law of one country by sending a case for the opinion of the Supreme Court of the other country, was created. Scotland, in regard to its laws, is a foreign country, and except where jurisdiction is created, in the manner recognised according to international law, or by Act of Parliament passed since the Union, no person in Scotland can be cited to the English Courts. Though the two countries be now governed by the same sovereign, and be subject to the same Parliament, yet this was under the condition, as set forth in the 18th Article of the Treaty of Union, that "the laws which concern public right, policy, and civil government may be made the same throughout the whole United Kingdom, but that no alteration be made in laws which concern private right, except for evident utility of the subjects within Scotland." And this is followed up by the provision in the 19th article, which positively declares "that no causes in Scotland be cognoscible by the Courts of Chancery, Queen's Bench, Common Pleas, or any other Court in Westminster Hall." Whether all this made Scotland a foreign country quoad its laws, or as a country having Courts exercising a foreign jurisdiction, is a question not material to solve. The two expressions do, in this connection, mean the same thing. Scotland has a law different from that of England; and, quoad that law, it is an independent state, entitled to demand from England adherence to the rules of international law, which determine the rights of natives of foreign states which may be made the subject of action in her Courts.

Now, then, in what manner does the law deal with the case of a party who dies possessed of moveable estate situated in different countries? Until this assertion of right on the part of the Court of Chancery to compel administration of an estate, merely because a portion of it was found at the death within England, the answer would have been simple enough. It was required by every nation, that an

(1) 11 Ct. Sess. Cas. 4th Series, 600.

H. L. (Sc.)
1885
EWING
v.
ORR EWING.

Find, declare, and decern in terms of the declaratory conclusions of the summons: Sequestrate the whole estate and effects of the deceased John Orr Ewing

executor is not entitled to collect the estate of the deceased, until his right to do so has been confirmed by the competent Court of every country where there is property to ingather. However clear may be the nomination of the executor by the deceased's will, yet confirmation or probate must be obtained. If an Englishman have funds in Scotland, at his death his executor must confirm in Scotland (Ersk. 3–2–42; *Smith's Trustees* v. *Grant*, 24 Court Sess. Cas., 2nd Series, 1142; *Hastings* v. *Hastings*, 14 Court Sess. Cas., 2nd Series, 489), and so likewise must the executor of a Scotsman obtain probate in England; and the same rule is enforced in the United States with reference to properties belonging to a citizen of one state which are situated in another, or of foreigners who have assets in the United States (Story, s. 513).

But there are two kinds of administration. There is the administration by the executor of the domicil of the deceased, and the administration by the executor appointed in the country where there was no domicil, but where there were assets. The ground for the appointment of a person in reference to the latter case has been attributed to different principles. Wharton, in his treatise on the "Conflict of Laws" (sect. 605), says that property is primarily subject to the law of the territory wherein it is found. The sovereign power there is guardian of all such property within its bounds, and it is its duty to see that its use is secured to the proper owner. Hence those who meddle with it, when occupancy has been closed by death, must first obtain the sanction of the Court of the place under whose control it is. Story (sect. 512), on the other hand, traces the practice to the hardship that would result to creditors in the country of the situs, if it were allowed to the executor or administrator of the domicil to withdraw funds from the foreign country without the payment of debts there, "and thus to leave the creditors to seek their remedy in the domicil of the original executor or administrator, and perhaps there to meet with obstructions and inequalities in the enforcement of their own rights from the peculiarities of the local law." The reason for the practice is in no way material, seeing that the practice is settled and approved in all countries. The material point is to ascertain what is the effect of the grant of administration in another country than that of the domicil.

The executor confirmed in the domicil is the principal administrator of the estate. The executor appointed in a foreign country who has taken out probate or letters of administration there, has a right to ingather the estate within the territory of the Court that gives him probate. He is entitled and obliged, from the proceeds of his recoveries, to pay all the debts of creditors in that foreign country. Questions of nicety have arisen as to whether he is entitled to pay the creditors there in full, if the estate, taken as a whole—that of the domicil and that of the situs—be insolvent, while the assets in the country of the ancillary administration may be sufficient to pay in full the creditors there. It is unnecessary further to refer to this point, because no such question arises in the present case. The ancillary executor is bound to account to the Court which gives him probate for all the money that he has recovered within its jurisdiction, and the executor of the domicil

contained in the inventory given up by the Defenders in the Court of the Commissary of Dumbartonshire, and recorded in the Court Books of the said

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is not entitled to demand from him these moneys before such accounting. This was the decision of the House of Lords in *Preston* v. *Melville*, 2 Rob. Ap. 88. But after having accounted to the Court where the funds were found, he is bound to remit any balance that may be in his hands to the executor of the domicil — the general administrator of the estate.

Now all this is perfectly established practice among nations. So far as can be discovered, no such pretension as that which has been set up by the Court of Chancery in England has ever been asserted by the Courts of any other country. None of the States of America have asserted the right to bring into the Courts of the ancillary administration, and to administer there the estate of a citizen domiciled in another State of the Union, merely because he had dollars invested in the State of the ancillary administrator. Nor is there any instance of any of the French Courts compelling an Englishman, who had moneys in the French Rentes, to account for the whole of his estate in the French Courts. On the contrary, as regards France, the Courts of that country do not hold themselves competent to entertain any suit for the division of a succession of a foreigner, who may have died in France, and who may have personal estate there, if his domicil were in a foreign country. All that the French Courts consider themselves entitled to do is to maintain the status quo, by sequestrating the estates in France, until the administration of the succession be settled in the country of the domicil. (See Bar's International Law (Gillespie), 536; Note by Foderé to Droit International Privé of Fiore, p. 709; Fœlix, sect. 159; *Margo* v. *MacHenry*, 1st of March, 1881, as in Journal du Droit International Privé, vol. 8, p. 432; *Falvez* v. *De Souza*, 31st of March, 1876. Ibid., vol. 4, p. 429.)

As recognised in the Courts of Scotland, the law was thus stated with reference to the succession of the Marquis of Hastings, whose mother had obtained in England letters of administration to the estate there, and who sought confirmation in Scotland with reference to the Scotch estate. "It is," said Lord Justice Clerk Hope, "a fixed rule of great importance, that the moveable property of a deceased party, in whatever country locally situate, shall be regarded as to succession, whether testate or intestate, by the law of the country to which he belongs—that is, of his proper domicil. The moveable property forms one universitas for succession, whether through the operation of his testament, or of the law which regulates his succession. Between these two cases there is no distinction as to this point. In like manner, unless there are some peculiar specialities or clear convenience, the *administration* is also to be that of the domicil. It may be that, in the first instance, the *collection* of the moveable funds either must be, or may be, by a different party from that administering in the country where he is domiciled, and so there may be a different title for collection and discharge. But even then the funds must be sent to the country where the succession is to be settled, unless by special arrangement. Hence, in principle, it is clear that the party in whom the *title* of administration is vested should be the same in both countries, since, in the foreign country, it is only a title for collection, and not

H. L. (Sc.) 1885

EWING v. ORR EWING.

Commissariot on the 13th May, 1878: Nominate and appoint George Auldjo Jamieson, Chartered Accountant in Edinburgh, to be judicial factor on the said

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for final distribution": *Hastings* v. *Hastings* (14 Court Sess. Cas. 2nd Series, 489).

As to how this matter is regarded in the American States, a few citations from American jurists, and from American judicial opinions, will be sufficient.

The practice of nations is thus stated by Story (sect. 513):—"The right of a foreign executor or administrator to take out such new administration is usually admitted, as a matter of course, unless some special reason intervene to vary or control it; and the new administration is treated as merely ancillary or auxiliary to the original foreign administration, so far as regards the collection of the effects and the proper distribution of them. Still, however, the new administration is made subservient to the rights of creditors, legatees, and distributees who are resident within the country where it is granted, and the residuum is transmissible to the foreign country only when a final account has been settled in the proper tribunal where the new administration is granted, upon the equitable principles adopted by its own law, in the application and distribution of the assets found there."

That learned writer (Story) cites with approval a judgment of Mr. Chief Justice Parker, of Massachusetts, who states the law in regard to the principal and ancillary administrations as follows—After laying it down that the judge who granted the ancillary administration can make the administrator to account, the Chief Justice says—"This cannot be construed to mean that in all cases a final settlement of the estate shall take place here" [the country of the ancillary administration]; "if it did, then if there were no debts here, and none to claim as legatees or next of kin, it would be necessary for all such to prove their right and receive their distributive shares here, notwithstanding the settlement must in such case be made according to the laws of the country where the deceased had his domicil. But we think in such case it would be very clear, that the assets collected here should be remitted to the foreign executor or administrator; for it seems to be a well-settled principle, that the distribution is to be made according to the laws of the country where the deceased was domiciled." He adds in a subsequent part of his opinion this hesitating statement:—"In the several cases which have come before this Court, where the legal character and effects of an ancillary administration have been considered, the intimations have been strong, that the administrator here shall be held to pay the debts due to our citizens": *Dawes* v. *Head* (3 Pickering's Amer. Rep. 144). This is clearly the law and practice of the Courts of those countries which recognise ancillary probate; and it is not disputed in the present case that the defenders could not have carried away the £25,000 which belonged to Mr. Ewing from England to Scotland without satisfying the English Court of administration that to the extent of that sum the English creditors were paid.

Mr. Wharton expresses himself as follows in regard to this matter (Wharton's Conflict of Laws, sect. 619):—"As to the regulation of ancillary administrations, the lex rei sitæ must necessarily prevail. But while this must be conceded, several subordinate questions of interest arise. When the funds in the hand of the

estate and effects, with power to him to take full and complete possession of the said estate and effects, and to hold and administer the same till the further

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ancillary administrator are sufficient to pay all legitimate claims existing in the jurisdiction by which such administration is granted, the administrator's course, it is true, is plain. He is to pay such debts, under direction of the Court to which he owes his authority; settle his accounts, under the supervision of such Court; and when such accounts are legally passed on and affirmed, transmit the residuum to the administrator in chief, i.e., the administrator appointed by the Court of the deceased's last domicil, to be distributed among heirs and legatees. But, in such cases, in view of the delicacy of the issues and complication of the trust, it is important that the ancillary administrator should make no payments except under decree of the Court by which he is appointed. To such Court he is exclusively bound to account. Nor are any assets to be transmitted to the administrator of the domicil when there are claimants within the jurisdiction of the ancillary administrator."

The case of *Preston* v. *Melville* (2 Rob. App. 88) has an important bearing on this subject. It was decided by the House of Lords upon an appeal from Scotland, and therefore, if applicable to this case, it is binding upon the Scottish Courts. In that case there were Scotch trustees appointed to administer the estate of a domiciled Scotsman, who obtained possession of the whole of the personal and heritable estate in Scotland, but there was a different person who had obtained administration of the personal estate in England, and who refused to convey to those Scotch trustees the estate taken up under her letters of administration, and in this refusal she was sustained by the judgment of the House of Lords. "The personal estate in England," said Lord Chancellor Cottenham, "rests and must remain with the appellant. If, after such administration shall have been completed, any surplus should remain, and it shall appear that there are trusts to be performed in Scotland to which it was devoted by Sir Robert Preston, it will be for the Court of Chancery to consider whether such surplus ought or ought not to be paid to the pursuers for the purpose of being applied in the performance of such trusts;" and it was determined that the English administrator must account to the English Court for the English assets, and satisfy all the creditors of the estate in England. "The letters of administration," said the Lord Chancellor, "under which he acts, direct him so to do, and he takes an oath that he will well and truly administer all and every the goods of the deceased, and pay his debts, so far as the goods will extend, and exhibit a full and true inventory of the goods, and render a true account of his administration. That such are the duties of an executor or administrator acting under a probate or letters of administration in this country is certain, although the testator or intestate may have been domiciled elsewhere. The domicil regulates the right of succession, but the administration must be *in the country in which possession is taken and held, under lawful authority, of the property of the deceased.*" This last sentence is the position taken up by the pursuers of the present action. The whole of the Scotch assets, the property of Mr. Orr Ewing, were taken and held under lawful authority in Scotland, and therefore, according to

H. L. (Sc.)
1885
EWING
v.
ORR EWING.

orders of the Court, with all usual powers, and the said judicial factor finding caution before extract, in common form: Suspend for the present, and till the

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this judgment, they must be administered there.

It is, however, said that in this case there was no person appointed separate from the defenders—the executors nominated by the will—to ingather the rents and profits of the estate in England, in other words, to collect the £25,000 that were there invested at Mr. Ewing's death. But what does this come to, except to strengthen all the more the argument against the assumption by the Court of Chancery, of a jurisdiction which international law denies to it? If there had been a separate executor appointed in England, with probate in his favour separate from the Scotch confirmation, there is reason for holding that there should be separate administration and accounting. But when the executors of the domicil and the executors who obtain probate in the foreign country are the same persons, and when these executors of the domicil have got possession of the whole goods and brought them to the country of the domicil, and when there is not a single debt to pay in the country of the ancillary administration, there is less reason than ever for holding that these executors should count and reckon in the country where the ancillary probate has been obtained.

This very point occurred for decision in America, where it was decided that the Courts of one state may compel an administrator or executor of an intestate, domiciled at his death in that state, to account for assets situate in a foreign state at the death of the intestate, but acquired by the same administrator by virtue of letters of administration issued to him in the foreign state; and it was held that the distribution must be according to the laws of the foreign state, so far as regards debts, and according to the laws of the domicile of the deceased, so far as regards the residue. In regard to the distinction between administration by the executor of the domicil and ancillary administration, the learned judge thus expressed himself—*Cureton* v. *Mills* (36 American Rep. 703)—"It is one of the necessary deductions from the general character ascribed to this administration, at the domicil of the decedent, by the authorities, that such administration is, in its nature, general and unlimited, while the ancillary administration is both special and limited. The nature of the administration had at the domicil of the decedent depends on the universally received doctrine that personal property follows the person of its owner. . . . The ancillary administration, we have said, is special and limited. The sense in which these terms are used is the same as that just applied to the original administration. That administration is special, because it extends merely to such personal effects of the decedent as may be found at his death in the place of ancillary administration, while, as we have seen, the scope of the original administration is commensurate with the whole personal estate of the decedent wherever situated. The ancillary administration is limited in the sense, that the objects to which that administration looks, do not comprehend all that are appropriate to the original administration. The ancillary administrator is primarily concerned only with the debts of the decedent at the place of ancillary administration, and with the administration of the assets only to the extent requisite to pay such debts."

further orders of the Court, all action on the part of the defenders in the administration or disposal of the estate: Interdict, prohibit, and discharge the defen-

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It is further said that the Court of Chancery exercises in this matter a very peculiar jurisdiction. It acts in personam, and compels persons within its jurisdiction to perform acts outwith that jurisdiction. Now this is a power which is not peculiar to the Court of Chancery. It belongs to all Courts of Equity, and the Court of Session has exercised it in the same manner as the Court of Chancery, with reference to cases in which it would be equitable to exercise the jurisdiction (M'Laren on Wills, vol. i. p. 49; *Leader* v. *Hodge*, Hume, 261).

After what has been shewn—according to international law—to be the limited character of the authority of the jurisdiction of the ancillary administration, it is not a little surprising to find that authority pushed to the extent of maintaining that the Courts of the domicil (Scotland) cannot enforce payment of a legacy due by the executors of the domicil to a legatee of the domicil, but that payment must be applied for to the foreign Court (England),—which has assumed the right to administer the estate because of the presence of assets of the deceased in England at the death. This was the case of *Brown* v. *Stirling-Maxwell's Executors* (1883, 10 Court Sess. Cas. 4th Series, 1235; 20 S. L. R. 818). Sir William Stirling-Maxwell was a Scotsman, and his domicil was in that country, but he happened to have funds in England, and therefore his executors required probate in England. There was also an administration suit in Chancery in the same way as there is here, which was held to carry the estate of this Scotsman into Chancery in the same way as it is now sought to be done with the estate of Mr. Orr Ewing. The executors of Sir William Stirling-Maxwell did resist the competency of these proceedings, but were overruled (9 Ch. D. 173, and 11 Ch. D. 522), and the whole of the estate is now taken away from the country of the domicil and the country of the executors to England. A legatee under the will of Sir William Stirling-Maxwell sued the Scotch executors in the Court of Session for payment of a legacy, to which the executors replied that they could not pay it without the authority of some official in the Chancery Court, and that the Court of Session had no jurisdiction in the matter, and could not grant decree. A grave argument in favour of this contention was submitted to the Court. The debtor and the creditor were both within the jurisdiction, and the estate was within the jurisdiction. But the Court was informed that no payment whatever could be made without the authority of some official in the Chancery Court of England. This was a novel and hitherto unheard-of assumption in favour of the powers of Courts dealing with ancillary administration. There was no dictum of any jurist or of any Court cited in support of it; merely the statement that such was the rule of the Court of Chancery. The Scottish Courts have in almost all cases declined to call a foreign executor to a general accounting for his administration, though he may be found in Scotland; while they have sustained action for a pecuniary legacy or a specific debt. The decision of the Court of Scotland in this case sustaining its jurisdiction was, in accordance with its practice, long settled: M'Laren, vol. i. p. 49; *Morison* (M. 4601); *Munro* (2 Court Sess. Cas., 2nd Series, 1151); *Robson* v. *Walsham*

H. L. (Sc.) 1885 EWING v. ORR EWING.

ders, until the said estate and effects are fully vested in, and taken possession of by, the said judicial factor, from removing the said estate or effects, or any

(6 Court Sess. Cas., 3rd Series. 4); *Ferguson* v. *Douglas* (3 Paton, 510, per Lord Loughborough); also it was in accordance with the judgment of the House of Lords: *Carron Company* v. *M'Laren* (24 L. J. (Ch.) 620), and with the decision of the American Courts: *Johnson* v. *Jackson* (21 American Rep. 285).

But although an executor found in Scotland may be compelled to pay a legacy or any specific debt, the Courts of Scotland have abstained from insisting on enforcing their jurisdiction to any further extent. If the claim made involved an accounting for the whole of the executry estate, such as a claim made by a residuary legatee for the residue, and so involving a general accounting, the Courts of Scotland decline to entertain such an action. They do so upon the plea of forum non conveniens. In the case of *Clements* v. *Macaulay* (16th March, 1866, 4 Court Sess. Cas., 3rd Series, at p. 592), the Lord Justice-Clerk Inglis explained the practice thus: "The cases in which the plea of inconvenient forum has been sustained are chiefly of two classes—1st, where foreign executors have been sought to be called to account in this country for the executry estate situated in a foreign country. In these cases the question always was, whether it was more for the true and legitimate interest of the executry estate and all the claimants, that the distribution should take place where the executors have had administration. There is, of course, in most cases, a strong presumption in favour of that consideration, and accordingly the plea is generally sustained in such cases. The law of the executry estate is the law of the country where administration is had; and there generally are the papers, the property, and the parties concerned:" *Young* v. *Ramage* (16 Court Sess. Cas. 1st Series, 572); *Brown* v. *Palmer* (9 Court Sess. Cas. 1st Series, 224); *Macmaster* v. *Macmaster* (11 Court Sess. Cas. 1st Series, 685; and 12 Ibid. 731).

Even when the Scottish Courts do entertain such an action, it is merely to enforce payment of a debt or legacy, and not in any way to administer or aid the executors in administering the estate. They only entertain the one specific claim which is brought before them by an action, and when that claim is satisfied the foreign executor is no further troubled. No doubt he is bound, if he have obtained confirmation in Scotland, to count and reckon for all the assets which he has collected there, so far as necessary to meet Scottish claims, whether of debt or of legacy; but beyond this the Courts of Scotland, like those of France, will not sustain an action against him relative to the executry estate.

It is true that there neither was nor is, any action pending in the Scottish Courts, similar to the suit that is now before Chancery, and this because of the recognition by the Scottish Courts of a more simple and economical mode of administration. An executor who is nominated by a testator, or who is appointed by the Commissary, and found security for the due discharge of his office, is allowed in Scotland to exercise his own judgment in reference to the debts and legacies he shall pay. Of course, if he pays a debt or a legacy that is not due, he will be answerable for the funds thus thrown away. Any doubtful claim of debt he is entitled to have constituted by a decree of a Court of Law at the expense of a

part thereof, or of the titles, writs, and evidents of the same, beyond the jurisdiction of this Court, and from delivering, paying, or accounting therefor to any claimant, and in cases of difficulty as to the construction of wills, facilities are afforded to him of obtaining a judgment of a Court by means of a special case and action of multiplepoinding. There is no continual recurrence to a clerk of Court or other official for sanction to every step of administration; and, if this were necessary in Scotland, it is hardly necessary to say that it would be deemed so hard and intolerable that it would have a short tenure of existence. Something of the kind did formerly exist, as stated by Erskine (3, 9, 47): "By our old custom it behoved executors who wanted to be discharged of their trust, and have their accounts settled, to apply for formal decrees of exoneration, upon actions to be pursued by them before the Commissaries against all interested in the executry; which decrees must have contained a particular inventory both of the funds and debts of the deceased, and an account how every part of the executry-funds was applied; for general decrees of exoneration were accounted as covers to fraud and concealments, and therefore did not avail the executor. Stair (b. iii. t. 8, s. 75); Durie March 10, 1632; L. Ludquharn (Mor. Dict. p. 3872). But now of a long time this action has been disused; and executors, when they are sued by creditors, are admitted to plead, by way of exception, that the inventory is exhausted by lawful articles of discharge."

The remedy of interdict which is here sought is one suitable to the circumstances, and according to the practice of the Courts both of England and of Scotland. In the case of *Hope* v. *Carnegie* (Law Rep. 1 Ch. 320) it appeared that a British subject had property both in England and in the Netherlands, which he conveyed by will in trust for certain parties. The Court of Chancery, in a suit, made a decree for carrying into execution the trusts of the will, and the usual accounts and inquiries as to real and personal estate were directed. One of the legatees, after this, commenced proceedings in the Netherlands for the administration of the real and personal estate of the testator situated in the Netherlands. Vice-Chancellor Stuart was asked to grant an injunction to restrain the proceedings in the Netherlands. His Honour, upon hearing the motion, considered it established, upon the evidence, that the testator was domiciled in England, and held, therefore, that no proceedings in the Netherlands could be allowed, as to the personal estate. His honour considered that, as to the real estate, the Court could not interfere; but that, inasmuch as the proceedings in the Netherlands related to personalty as well as to realty, they ought to be restrained altogether, and this judgment was affirmed upon appeal,—Lord Justice Knight Bruce dissenting in so far as the injunction restrained from continuing the proceedings as far as regards realty in the Netherlands.

In the Scotch Courts the remedy by interdict has also been sanctioned. Thus, interdict was granted by the Court of Session against removing the title-deeds of a Scotch heritable estate, which the trustees, by an order of the Master of the Rolls, had been required to deposit in the record office of the Court of Chancery: *Maclachlan* v. *Meiklam and others* (19 Ct. Sess. Cas. 2nd Series, 960); *Young* v. *Barclay* (8 Ct. Sess. Cas. 2nd Series, 774).

H. L. (Sc.) 1885

EWING v. ORR EWING.

person or persons other than the said judicial factor, and decern, and allow interim extract: Dispense with the reading in the minute-book, and allow

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I am urged to dismiss this action because the House of Lords, the ultimate Court of Appeal from Courts in Scotland, have upheld the order of the Court of Chancery, and that, therefore, as it is the same tribunal which must ultimately dispose of this case, it is idle now to pronounce a judgment in any sense contrary to what has been decided. This argument altogether overlooks what is the position of the House of Lords. It is, no doubt, the ultimate Court of Appeal appointed by the constitution of the country. It requires to administer the law according to the law of the country from which the appeal comes. In the case before it, of Orr Ewing, it had only to determine whether the Chancery Court had correctly decided as to the rule of Chancery practice. In the case that will now come before it—if this case be appealed to the House of Lords—it will have to determine, not any rule as to Chancery practice, but a question as to international law—that is, quoad hoc, the law of Scotland. The House of Lords cannot—or, at all events, ought not to consider, in reference to the question brought before them by an appeal from this judgment, any other point than this, whether, according to the law of nations, this rule of the Chancery Court of England must be respected by a foreign Court, when the people of that foreign country, in recognising it, would be thereby subjected to grievous expense and many inconveniences; and when, moreover, the practice itself is contrary to all sound principles of international law.

So far as I have been able to ascertain—and I have used endeavours to ascertain it—the practice of the Court of Chancery in this matter is without example in the Courts of any of the other European States; as it certainly is so in America even in those States of the Union where the English law is most closely followed. If the action of the Court of Chancery were sustained by the Executive Government of this country, it might lead to embarrassing questions with foreign nations. A citizen of the French or American Republics, whose domicil is in his own country, may have investments in the British funds, and one of his executors—a Frenchman or American—may be resident in London. If the Court of Chancery, in an administration suit, committed that executor to prison for not bringing the whole assets of the deceased from France or America to be administered in London, it is not to be supposed that an act like this would be patiently submitted to by the foreign Governments whose subject was imprisoned. And it is not at all clear that, however settled may be the practice of the Court of Chancery, the executive Government of this kingdom would sustain it—contrary as it is to the law of nations—at the hazard of disturbing peaceful relations with foreign powers. Nor can this practice of the Court of Chancery have been so very settled, seeing that so great a master of it as Lord Westbury, in the year 1862, expressed himself as follows: "I hold it to be now put, beyond all possibility of question, that the administration of the personal estate of a deceased person belongs to the Court of the country where the deceased was domiciled at his death . . . The utmost confusion must arise if, when a testator dies domiciled in one country, the Courts of every other country in which he has personal property should assume the right, first of declaring who is the personal represen-

extract to be issued forthwith; reserving in the meantime all questions of expenses (1).

H. L. (Sc.)
1885
EWING
v.
ORR EWING.

tative, and next of interpreting the will and distributing the personal estate situate within its jurisdiction according to that interpretation. An Englishman, dying domiciled in London, may have personal property in France, Spain, New York, Belgium, and Russia; and if the course pursued by the Court of Probate and the Court of Chancery in the present case were followed by the Courts of those several countries, there might be as many different personal representatives of the deceased, and as many varying interpretations of his will, as there are countries in which he is possessed of personal property. It is unnecessary to dwell upon the evils which would result from this conflict of jurisdiction. It was to prevent them that the law of the domicil was introduced and adopted by civilized nations. I am, therefore, of opinion that the executors might have excepted to the jurisdiction of the Court of Chancery as a Court of construction and administration. They might have insisted that it was the duty of the Court to hand over to the executors the clear English personal estate, and to have remitted the next of kin to the Court of the domicil of the testator. But the executors did not do so:" *Enohin* v. *Wylie* (April 3, 1862; 10 H. & C. 1; 31 L. J. (Ch.) 405).

The Lord Chancellor (Earl of Selborne), in the case of *Ewing and Others* v. *Orr Ewing*, dissents from this opinion; but at all events, this much can be said for it—that it was the opinion of Lord Westbury. And he stated an incontrovertible fact in saying that his opinion was in accordance with the views given effect to by the Courts of civilized nations, and upheld by the jurists recognised as authorities on international law.

Holding that the orders of the English Court are contrary to international law, it is unnecessary to do more than refer to another point which this case raises. I have already quoted the 19th Article of the Treaty of Union, which declares that "No causes in Scotland be cognoscible by the Courts of Chancery, Queen's Bench, Common Pleas, or any other Court in Westminster Hall." Whether the case of *Ewing and Others* v. *Orr Ewing* be a "cause" in the sense of this article, and whether the action of the Court of Chancery is in violation of the treaty, are questions which do not call for a decision. If these questions were answered in the affirmative there would be another clear ground for refusing to recognise the validity of the Chancery order—an order in that case which, besides being obnoxious to international law, would be in direct violation of the treaty which created the union between the two countries. Whether the new rule (Order XI., rule 1. (d)) of the Rules of the Supreme Court, 1883, has made any alteration in the Chancery procedure in administration suits, I cannot tell. But whether it has or not, it must only apply to future cases.

The result of my consideration of this case is, that the Orders of the Court of Chancery in England are inconsistent with the rules and practices between independent nations; and that therefore the Courts of the domicil are bound, in the protection of the interests of the estate within the domicil (and to this estate alone is my judgment confined) to grant interdict against compliance with these orders.

(1) Lord President (INGLIS), having stated the facts, continued:—The trustees proceeded to make up their title to the personal estate, by pre-

H. L. (Sc.) 1885 EWING v. ORR EWING.

There were two other interlocutors appealed against, namely, one dated the 7th of March, 1884, and the other dated the 12th

senting an inventory in the Commissary Court of the county of Dumbarton, including the English as well as the Scottish moveables, and having obtained confirmation from the Commissary, in terms of sect. 9 of 21 & 22 Vict. c. 56, and had the confirmation stamped with the seal of the Probate Court in England, under sect. 12 of the same Act, they reduced the personal estate into possession. They were thus duly vested by a decree of the Judge of the Commissary Court of Dumbartonshire, pronounced under express statutory authority, with the whole personal estate of the deceased, and having brought the English assets to Scotland, they proceeded to administer the trust according to the usual practice in this country.

Such administration by the law of Scotland required no further legal proceedings, after the title of the trustees had been completed by confirmation as executors. The trustees would not have been entitled to throw the estate into Court, except upon an allegation, supported by evidence, that there were competitions of right under the trust-settlement between legatees and creditors, or between different persons claiming as beneficiaries under the trust, which the trustees could not undertake to determine without the authority of the Court, or on the ground that there was so much difficulty and embarrassment in the distribution of the estate, that the trustees would not be in safety to act on their own judgment. On the same grounds any person interested in the succession of the deceased, who found that he could not obtain what he claimed, might have raised an action of multiplepoinding in name of the trustees, for the purpose of having the existing disputes judicially determined. But if either the trustees or the individual took such a proceeding without establishing its necessity, the suit would be dismissed with costs. If the claim of a legatee or creditor is resisted by the trustees, on the ground that the trust-settlement gives no right to the so-called legatee, or that the truster was not, and the trust-estate is not indebted to the so-called creditor, the legatee or creditor cannot, by any proceeding, throw the estate into the hands of the Court, but must sue the trustees by petitiory action for payment. Even where there are competitions of right between different persons to a certain fund or to certain portions of the trust-estate, it is by no means necessary to throw the whole estate into court. It is only the particular fund, or a part of the estate sufficient to meet the claim of the party who shall be successful in the competition, that requires to be placed in manibus curiæ. In such a case also, there is the familiar and very inexpensive remedy of presenting a special case to the Court, where the parties are agreed about the facts.

The great principle in the administration of Scotch testamentary trusts is, to leave the administration where the testator himself has placed it, unless, from fault or accident, the trust has become unworkable: and even in that case the Court do not undertake the administration, but appoint new trustees, or a judicial factor, who will occupy the same position, and possess the same powers of extra-judicial administration which the trustees named by the testator occupied and possessed. After this

of March, 1884. The first interlocutor gave the judicial factor authority to take possession of the trust funds and documents,

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explanation it may seem almost superfluous to say that an "administration suit" of the kind used and sanctioned in the English Courts of Chancery is altogether unknown to Scotch practice. I trust I do not exceed the true limits of a judicial utterance, when I add, that it is very fortunate for the people of Scotland that it is so. [His Lordship then commented on the proceedings in Chancery; the averment of the pursuers; and the conclusions of the summons, and continued:]

It is evident, that if we pronounce judgment in terms of all or any of these conclusions (of the summons) against the defenders, there will arise immediately a conflict of jurisdiction between this Court and the Chancery Division of the High Court of Justice in England. This is a very serious matter, and we must therefore deliberately consider (1.) what are the relations of the two Courts, and (2.) what are the grounds on which the jurisdiction of each Court to deal with this trust-estate is maintained.

1. As to the relations of the two Courts, I hold that, in proper questions of jurisdiction such as the present, *the judicatories of Scotland and England are as independent of each other, within their respective territories, as if they were the judicatories of two foreign states.* I am anxious to formulate this rule, which is the necessary result of the Treaty of Union, with as much accuracy and precision as possible, because a loose and illogical statement of so important a constitutional doctrine is both dangerous and misleading. I have been, however, so much accustomed to regard it as an incontrovertible proposition, that I was somewhat surprised to read in the Chancery proceedings which have been laid before us, this passage in the judgment of so very learned and able a Judge as the late Master of the Rolls:—"I caught during the argument an expression to which I do not assent. Scotland was called a foreign country—a foreign jurisdiction. All that in my opinion is quite erroneous. Ever since the union of the kingdom of Great Britain, Scotland has been an integral part of Great Britain; it is not a foreign country." I sympathise with the learned judge so far, that Scotland and England cannot with strict propriety be spoken of as being in the relation of foreign countries. But as the proposition with which he was dealing was, as he says, only "caught during the argument," he was probably misled by inaccuracy of expression; and the proposition itself, if expressed more precisely, might have commanded his serious attention. I do not say it would probably have altered his judgment on the case before him. But it might have enabled him to avoid what follows in the statement of his opinion:—"To talk of Scotland as a foreign country, and to say that the same rules apply is, I think, a total error. It is not only an integral part of this kingdom, but *the judgment of this Court can be enforced in Scotland* in the same way that the judgment of a Scotch Court can be enforced in England. But there is more than that. In the case of a foreign country there is the difficulty of ascertaining the foreign law; and where questions of foreign law arise, it is certainly very inconvenient to try them by the sworn and unsworn testimony of advocates and experts as to what the law is. It is much more convenient, of course, to obtain the

(H. L. (Sc.) 1885

EWING v. ORR EWING.

and also an order on certain banks to pay sums of money and transfer the securities belonging to the trust estate. The second

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decision of the judges of the country on the law of their own country. Well now, what has the legislature done? Recognising that, the legislature has empowered the English Courts, where a question of Scotch law arises in the course of English litigation, to take the opinion of the Scotch Courts, which they are bound to give, and correlatively has empowered the Scotch Courts to take the opinion of the English Courts on the point of English law arising on Scotch litigation; there is, therefore, no difficulty at all in deciding a point of Scotch law in England, because they decide it not in England, but in Scotland; and so with regard to English law in Scotland, because that would be decided in England; all those difficulties are therefore purely imaginary."

Before I advert further to the reasons which seem to have led the learned judge to the conclusion that in questions of jurisdiction Scotland and England do not stand in the relation of foreign kingdoms, or, adopting the more correct formula, that the judicatories of Scotland and England are *not* as independent of each other as if they were the judicatories of two foreign states, I wish to cite one very weighty authority, which is in terms contradictory of this proposition. In the appeal to the House of Lords from this Court regarding the guardianship of the present Marquis of Bute, Lord Campbell, as Chancellor, thus expressed himself:—(May 17, 1861, in *Stuart* v. *Marquis of Bute*, 9 H. L. C. 440. See also *Johnstone* v. *Beattie*, 10 Cl. & F. 42.) "I beg to begin by observing that, as to *judicial jurisdiction*, Scotland and England, although politically under the same Crown and under the supreme sway of one united legislature, are to be considered as independent foreign countries, unconnected with each other. This case is of a judicial nature, although not between parties who are plaintiffs and defendants, and it is to be treated as if it had occurred in the reign of Queen Elizabeth . . . . The holder of the Great Seal of the United Kingdom is Lord Chancellor of Great Britain, and by statute he has important functions to exercise in Scotland, such as the appointment and dismissal of magistrates, and sealing writs for the election of Scotch Peers, and members for Scotland of the House of Commons. But as a judge, his jurisdiction is clearly limited to the realm of England. . . . As judge he has no jurisdiction in Scotland whatever. In this respect there is an entire equality and reciprosity between the two divisions of this island, and a decree of the Court of Chancery is not entitled to more respect in Scotland than an interlocutor of the Court of Session in England." The Lord Chancellor was followed in that case by Lords Cranworth, Wensleydale, Chelmsford, and Kingsdown, no one of whom expressed the slightest dissent from his opinion, or even indicated that it was in any respect too unqualified.

The Master of the Rolls seems to have been misled into the opinion he expressed, in opposition to this high authority, by the supposed operation and effect of recent statutes, providing for the enforcement of Scottish judgments in England, and of English judgments in Scotland, and also for the more convenient ascertainment of the law of one part of the United Kingdom by a Court in another part.

interlocutor granted warrants to messengers-at-arms to search for and take possession of specified documents, and for that purpose

By what is known as "The Judgments Extension Act," 31 & 32 Vict. c. 54, a judgment of a Court of common law in England for debt, damages, or expenses (*but not an order or decree of the Court of Chancery*) may be enforced in Scotland by the party holding the judgment producing to a registrar in Scotland a certificate of the judgment, and having it registered. And e converso a judgment by this Court for debt, damages, or expenses (but not any other kind of order or decree) may, by a corresponding proceeding, be enforced in England. But this gives no jurisdiction to the Scotch Court in the matter of the English judgment, nor jurisdiction to the English Court in the matter of the Scotch judgment; the one remains an English judgment throughout, though endorsed, so to speak, by a Scotch official under the authority of the statute, and the Scotch judgment also remains throughout a Scotch judgment, though endorsed by an English official under the like authority. The 22 & 23 Vict. c. 63, "to afford facilities for the more certain ascertainment of the law administered in one part of Her Majesty's dominions when pleaded in the Courts of another part thereof," provides in effect, that in any suit or proceeding, when the facts are ascertained, a case may be submitted by a Court in Scotland to a Court in England to ascertain the law of England applicable to such facts, or by a Court in England to a Court in Scotland, to ascertain the law of Scotland applicable to such facts. But how the passing of such an Act can affect the jurisdiction of any of the Courts in Scotland or England, or their relation to one another in the matter of jurisdiction, does not at all appear. These very convenient reciprocal provisions, for the enforcement of Scotch judgments in England, and English judgments in Scotland, and for the more convenient ascertainment by any Court, of the law which that Court does not judicially know or administer, are authorized by Acts of the Imperial Legislature of the United Kingdom. But the same reciprocal advantages and conveniences might be brought about in the case of English and French Courts, or of Scottish and Dutch Courts reciprocally, not indeed by an Act of the Parliament of the United Kingdom, but by treaty or convention; and it could hardly be contended that the effect of such treaty or convention would be to affect the relation of these Courts to one another in a conflict of jurisdiction. Of this there could not be a more instructive or apposite illustration than is to be found in in 24 & 25 Vict. c. 11, which is intended to extend the benefits of the 22 & 23 Vict. c. 63, to cases in which any of the Courts of the United Kingdom require to ascertain the law of another nation, "with the Government of which Her Majesty may be pleased to enter into a convention for the purpose of mutually ascertaining the law of such foreign country or state, when pleaded in actions depending in any Courts within Her Majesty's dominions, and the law as administered in any part of Her Majesty's dominions when pleaded in actions depending in the Courts of such foreign country or state."

It would, in my opinion, be a waste of time to say more as to the relations in which the Chancery Division of the High Court of Justice in England and

H. L. (Sc.) 1885

EWING v. ORR EWING.

to open all shut and lock fast places, and to deliver the said documents to the judicial factor.

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this Court stand to one another, or in support of the general proposition that, by virtue of the treaty of Union, the judicatories of England and Scotland are as independent of each other within their respective territories as if they were the judicatories of two foreign states. I therefore proceed, in the second place—

II. To inquire, what are the grounds on which the jurisdiction of each of the two Courts to deal with this trust-estate is maintained.

Prior to the passing of the Confirmation and Probate Act, of 1858, to the effect of which I shall more particularly advert, the portion of Mr. Orr Ewing's personal estate, which was locally situated in England, must have been taken up and administered by the defenders under English letters of probate, while the remainder (being the great bulk of the personal estate) would have fallen within the Scottish confirmation. To such a state of circumstances the law laid down by Lord Chancellor Cottenham in *Preston* v. *Melville* would have been clearly applicable. The personal estate in that case was situated partly in Scotland and partly in England, but the great bulk of it was in England. The trustees appointed by the testator having declined to act, the Court of Session appointed new trustees to act in their place; but that appointment did not confer on the new trustees the office of executors-nominate, which the testator had conferred on the original trustees. Therefore Lady Baird Preston, as the person chiefly interested in the succession, administered the whole personal estate as next of kin. Obtaining confirmation in Scotland and letters of administration in England, she handed over the whole of the Scotch personalty to the trustees for the purposes of the trust, but declined to part with the personalty in England until she and her sureties in the Prerogative Court should be discharged by that Court, or some other competent Court in England. The trustees, on the other hand, contended that her ladyship was bound to hand over to them, absolutely and immediately, for the purposes of the trust, the whole assets belonging to the testator at the time of his death, wherever situated, and by what title soever she held or had acquired them. Lord Cottenham decided in favour of Lady Baird Preston, on grounds which appear to me to be irresistible. The general rule which he enunciated, and which has often been quoted, is that "the domicil regulates the right of succession, but the administration must be in the country in which possession is taken and held, under lawful authority, of the property of the deceased." But the reason which his Lordship assigns for this rule is not less important than the rule itself. "By the law of England, the person to whom administration is granted by the Ecclesiastical Court is by statute bound to administer the estate, and to pay the debts of the deceased. The letters of administration under which he acts direct him to do so, and he takes an oath that he will well and truly administer all and every the goods of the deceased, and pay his debts so far as the goods will extend, and exhibit a full and true inventory of the goods, and render a true account of his administration." And it may be added that the Prerogative Court require the administrator further to find sureties (in the case of Lady Baird Preston to the

Since the date of the last interlocutor the judicial factor has been in possession of the trust estate, and has duly administered it in terms of testator's will.

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amount of £360,000) for the full performance of these duties. To pay over the English funds to be administered by the Scotch trustees, his Lordship holds, would be "to act in violation of the oath she has taken, and in dereliction of the duties of the office with which she has been invested in this country." But when the English personal estate has met all its obligations in England, his Lordship does not doubt that the residue, if any, will be payable to the Scottish trustees.

Now, applying the rule established or declared in *Melville* v. *Preston* to the present case, where the personal estate, with a small exception, is situated in Scotland, and possession of it has been taken and held there by the defenders under the lawful authority of the confirmation of the Commissary of Dumbarton, it follows that the administration must be in this country. They have given up a full and true inventory on oath of the whole effects of the deceased, and have undertaken that they will well and truly administer the estate, and pay the debts of the deceased, and render just count and reckoning for their intromissions.

Then how is this duty and obligation to administer the estate in Scotland affected by the circumstance that the deceased had also personal estate to a comparatively trifling amount in England? Prior to the Act of 1858, of course it would have been necessary for the defenders to obtain probate in the English Court to give them a legal title to uplift the English personalty; and this portion of the estate they would, on Lord Cottenham's principle, have been bound to administer in England. If there were any English debts they must be satisfied in the first instance. If there were any directions in the testator's settlement that required to be *performed in England, these would next fall to be provided for.* But after these debts had been discharged and these purposes fulfilled, the plain duty of the defenders would have been to combine the residue of the English with the Scottish part of the estate, and to administer the combined estate in Scotland as a whole, according to the directions of the testator.

The object of the ancillary administration in England would, of course, have been to obtain a legal title to the English funds; and this could not have been obtained by the defenders without an undertaking to administer and account in England. But as soon as they had satisfied all just claims in England out of the estate there situated, they owed no further duty to any party or to any Court in England.

All this is very clear on general principle; and it would have been still clearer in its application to the circumstances of the present case, if the defenders had required to obtain and had obtained letters of probate from the English Court. For there were no English creditors of the deceased, and there were no purposes of his settlement which were to be carried into execution elsewhere than in Scotland. In such circumstances it appears to be the opinion of all jurists, as is successfully demonstrated by the Lord Ordinary, that even if the ancillary title of administration is in a different person from that of the principal administra-

H. L. (Sc.)
1885
EWING
v.
ORR EWING.

On the 13th of May, 1884, Chitty, J., made an order inter alia as follows: "That the Court being of opinion that it will be for

tion, the simple duty of the ancillary administrator is to remit the funds which he has recovered to the principal administrator.

It is unnecessary to follow this theme further in the way either of argument or illustration, because it appears to me, that in the present case the title of administration possessed by the defenders is, by force of the statute 21 & 22 Vict. c. 56, a purely Scotch title, comprehending a title to administer the English funds, to the same effect as if they had been locally situated in Scotland.

The title and preamble of the statute plainly announce the purpose of the legislature to be, to extend over the United Kingdom the effect of a confirmation in Scotland, and of grants of probate and administration in England and Ireland. The one condition required to make the statute applicable is, that the person whose estate is to be administered shall have died domiciled in that part of the United Kingdom in which the confirmation or grant of probate or administration is obtained. The object of the statute was to secure economy, and also simplicity and unity of administration, and, with this end in view, to do away with the necessity of ancillary administration as regards the three parts of the United Kingdom. (Reads the 9th and 12th sections, see ante, p. 455.)

It cannot be disputed that this (12th) section of the Act gives to the Scottish confirmation extra-territorial operation and effect. But it has been argued, that the words of this section giving to the confirmation, when sealed by an officer of the Probate Court, "the like force and effect in England as if a probate, &c., had been granted by the said Court," subject the confirmed executor to all the same liabilities, duties, and jurisdiction as if he had actually obtained a grant of probate in England. To this reading of the statute I cannot assent; and my reasons will be most readily understood by a reference to the proceedings in the present case, which, it is not disputed, are strictly in accordance with the provisions of the statute.

The defenders having in the Commissary Court of Dumbartonshire given up on oath an inventory of the whole of the deceased's personal estate, including the funds and effects situated in England, as well as those situated in Scotland, and having exhibited to the commissary the trust disposition and settlement of the deceased, the commissary pronounced his deliverance, confirming the nomination of the defenders as executors, and giving them "full power to uplift, receive, administer, and dispose of the said personal estate and effects" (i.e., the estate and effects contained in the inventory, both Scottish and English), "to grant discharges thereof, if needful, to pursue therefor, and generally every other thing concerning the same to do, that to the office of an executor nominate is known to belong."

Now this is the sole grant of right to administer the estate of the deceased which the defenders have obtained. They require no other. No doubt, to give it the effect of an active title to recover from English debtors, or to uplift English funds, the seal of the Probate Court of England is directed by the statute to be impressed upon it. But the official of the Probate Court cannot refuse to impress the seal. He has no discretion in the

the benefit of the infant plaintiff that an appeal should be brought to the House of Lords from the interlocutors of the Court of

matter. His act is not judicial, but a mere statutory formality. The seal is impressed, not because the Probate Court or its official has seen the nomination of the executors, or the inventory of the estate, or the oath of the executors confirmed, not because the executors have taken any oath in the Probate Court, or undertaken any duties in that Court, or found there any security for their just and true administration, but simply and solely because the officer of the Probate Court has had presented to him what bears to be a comfirmation sealed with the seal of the commissary of Dumbartonshire, together with a certified copy of the interlocutor of the commissary, pronounced in terms of the statute. He, as ordained by the statute, affixes the seal which gives the confirmation force and effect in England, solely because the commissary of Dumbartonshire has given the executors the power and right to ingather that portion of the estate which is situated in England. And after the seal is impressed the statute requires that the confirmation shall be "returned to the person producing the same," so that neither the confirmation nor the sealing of it is required to be made matter of record in the Court of Probate. To hold that the Scotch confirmation when sealed, and because it is sealed by the officer of the Probate Court, becomes an English grant of probate in a question of jurisdiction, seems to be much the same thing as it would be to hold that a judgment of an English Court registered in Scotland and put to execution there under the Judgment Extension Act, becomes in a question of jurisdiction a judgment of a Scotch Court.

I am of opinion, that the effect of the statute of 1858, and of a confirmation under the statute embracing English personal estate in the inventory given up on oath to the Scotch Commissary Court, is to enable the executors to administer the English estate along with, and as part of, the Scotch estate, and to exempt the executors from being subject to English jurisdiction by reason of a part of the executry estate having been locally situated in England at the death of the testator. And I am confirmed in that opinion by a provision in another later statute, 30 & 31 Vict. c. 97, "To facilitate the administration of trusts in Scotland." The 5th section of that Act empowers trustees, acting under any Scotch deed of trust, to invest the trust funds "in government stocks, public funds, or securities of the United Kingdom, or stock of the Bank of England," but adds this proviso, "that the trustees shall not be held to be subject as defendants or respondents to the jurisdiction of any of Her Majesty's Superior Courts of Law or Equity in England or Ireland, either as trustees or personally, by reason of their having invested or lent trust funds as aforesaid." This proviso is a proper complement of the Confirmation Act of 1858 as I read it. But if the truster's possession, at the period of his death, of any personal estate in England would have the effect of subjecting the trustees and the whole or part of the trust estate to the jurisdiction of English Courts, it can hardly be supposed that this carefully worded proviso would have found a place in the statute.

Another argument of the defenders is founded on the circumstance that

H. L. (Sc.) 1885

EWING v. ORR EWING.

Session, and the defendants, the trustees, by their counsel at the bar, submitting that if such an appeal is brought, the same may

when the administration suit was commenced in the English Court there was no corresponding suit, and no suit of any kind depending in this Court affecting the trust estate; and reference was made to the established rules respecting jurisdiction in bankruptcy, where a trader has creditors in different parts of the United Kingdom.

I do not stop to point out the obvious distinction in principle between the administration of a bankrupt estate by a trustee or assignee in bankruptcy, and that of the estate of a solvent person deceased, by trustees and executors appointed by himself. The analogy does not aid the defenders at all. If a bankrupt have only one trading domicil, the distribution of his estate among his creditors must be in the Court of that domicil. But when the bankrupt has two trading domicils (and in that case only), the process of distribution of the estate may be instituted in either domicil; and when it has been instituted in one of the domicils, and the estate has become vested in a trustee or assignee, the jurisdiction of the Bankruptcy Court of that domicil is exclusive of the other. This was settled by Lord Eldon in *Selkrig* v. *Davies and Salt* (2 Dow, 230), and was given effect to in *Goetze* v. *Aders, Preyer & Co.* (2 Court Sess. Cas. 4th Series, 150), and the *Phosphate Sewage Company* v. *Lawson's Trustee* (5 Court Sess. Cas. 4th Series, 1125). But there is nothing here analogous to two trading domicils. The domicil of the testator (so far as that affects the question) was in fact in Scotland, *and was fixed as Scottish for confirmation purposes by the decree of the commissary, under the authority of the statute.*

The defenders further say, that there is no example of an interdict being granted by this Court to prevent persons subject to the jurisdiction of this Court obeying the order of the Chancery Court of England, in a suit in which these persons are defendants. This is a mistake. There is a very clear and instructive example of it in the case of *Maclachlan* v. *Meiklam and Others* (19 Court Sess. Cas. 2nd Series, 960). One cannot be surprised that such cases are of rare occurrence; because fortunately it is seldom that the Courts of two parts of the United Kingdom come into conflict. When that does occur an adequate remedy will always be found.

Lastly, the defenders contend that the orders of the Chancery Division having been affirmed on appeal by the House of Lords, this Court is bound by that judgment on appeal, because the House of Lords is the Court of ultimate resort for every part of the United Kingdom. This would be a very formidable defence, if it were not founded on a fallacy.

I recognise without hesitation the position of the House of Lords as the Court of ultimate resort, in the fullest sense, for the whole three parts of the United Kingdom; and I had occasion in the very remarkable case of *Virtue* v. *Commissioners of Police of Alloa* (1 Court Sess. Cas. 4th Series, 285), differing from some of my brethren, to express myself in the following words: —"I think it is an error in constitutional law, to represent the House of Lords as sitting at one time as a Scotch Court, and at another time as an English Court. That House, I apprehend, sits always in one character, as the House of Lords of the

be conducted in their names by the plaintiff's next friend, on a proper indemnity; let the plaintiff's next friend be at liberty to

United Kingdom, and as such the imperial Court of Appeal for the whole three parts of the United Kingdom. It has occasion to administer at one time the law of Scotland, at another the law of England, and at another the law of Ireland. But in appeals coming from all the three countries, it has also to deal with principles of law that are common to the whole three." If this be sound the corollary is manifest. This Court is bound by the judgments of the House of Lords in cases of the last description as authorities, even though the judgments may have been pronounced in English or Irish appeals, just as much as it would be by judgments pronounced in Scotch appeals. But it is otherwise when the House is administering a law different from or antagonistic to the principles of the law of Scotland. There the judgment on appeal is no more binding on this Court than the judgment of the Court of first instance, from which the appeal comes.

In the present case the judgment of the House of Lords would not have been pronounced in the terms which are before us, had it not been for the rules and precedents of the English Court of Chancery. A long practice in any of the Courts of the United Kingdom cannot be disregarded by the House of Lords without serious inconvenience. But such practice can have no influence whatever on the independent judicatories of another part of the United Kingdom, or on the House of Lords sitting in review of their judgments.

The pursuers by this action demand that the administration of the estate of the late Mr. John Orr Ewing shall take place in Scotland, according to the provisions of his trust disposition and settlement, and to this I think they are entitled ex debito justitiæ, because there are no rules or principles of international law or acts of the Imperial Parliament, which require them to submit to have the administration in any other country.

If the defenders as trustees and executors had voluntarily proposed to remove the estate and its titles and securities out of Scotland, for the purpose of carrying on the administration elsewhere it will hardly be disputed that the pursuers would have been entitled to interdict to prevent this being done. The defenders are not acting voluntarily, but they propose to do the very same thing, in obedience to the orders of the Chancery Division in England. But this cannot alter or prejudice the rights of the pursuers, unless the orders of the Chancery Division are binding on the pursuers, which, for the reasons already given, I think they are not. One cannot but sympathise with the defenders in the very embarrassing position in which they are placed, from no fault of their own; but no considerations of this nature can be allowed to influence the Court in judging of the pursuers' right to the remedy they ask by the conclusions of their summons.

I propose to your Lordships, that judgment should be given in terms of the declaratory conclusions, and as regards the other conclusions, it appears to me that the most appropriate and effectual remedy is to sequestrate the trust estate, and (without removing the trustees from office) to appoint a judicial factor, with all the powers conferred on the defenders by the trust disposition and settlement, to

H. L. (Sc.) 1885

EWING v. ORR EWING.

bring and prosecute in the names of the defendants, an appeal to the House of Lords, from the interlocutors of the Court of

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hold and manage the estate and distribute the same according to the directions of the deceased truster. The effect of this will be to relieve the trustees, for the present, of all charge of the estate, and to suspend all action on their part as trustees and executors; but the sequestration need not be permanent, if the trustees shall hereafter find themselves in a position to resume their duties of administration without interference from the Chancery Division. The course which I propose is in accordance with the practice of the Court when testamentary trustees become from any accidental cause temporarily disqualified to administer the trust; and it is, in my opinion, at once the most effectual remedy in the pursuers' interest, and the most appropriate to the unfortunate position in which the defenders are placed.

LORD DEAS said, inter alia:—I have read and carefully considered the opinion proposed to be delivered in this case, and which has now been delivered by your Lordship, the Lord President, and I entirely concur in it.

In particular, I cannot entertain any doubt that under the Treaty of Union the judicatories of Scotland and of England are as independent of each other in their respective territories as if they were the judicatories of two foreign states.

Neither can I entertain any doubt that the effect of the affirmance by the House of Lords, upon appeal, of the orders issued by the Chancery Division in England cannot be to give them any higher force or effect in Scotland than as orders regularly issued in conformity with Chancery rules and practice in themselves possess. In this respect I regard the effect of that judgment of affirmance as toto cælo different from the effect which the reversal by the House of Lords, under Lord Cottenham as Chancellor, had upon the judgment of the Court of Session in the action brought against my then client, Lady Baird Preston, at the instance of Sir Robert Preston's trustees.

LORD MURE:—I concur in the opinion which has been delivered by your Lordship, and in the grounds of that opinion. The main question here raised is certainly a serious and important one, inasmuch as it involves a conflict of jurisdiction between the Courts of this country and the Chancery Division of the High Court of Justice in England, which Courts, as your Lordship has shewn upon the highest authority, stand towards each other in the relationship of Courts of foreign countries in all matters of judicial jurisdiction. Such being the nature of the question, it has of course formed the subject of very anxious deliberation, and after carefully considering it in all its bearings, the conclusion I have come to is, that the pursuers are entitled to one or other of the remedies they ask under the conclusions of this action, in order to prevent the administration of this trust, in which they are deeply interested, from being removed from this country to England.

The pursuers' interest in the trust estate amounts to four-fifths of about £450,000; and having regard to the allegations made by the pursuers on the record as to the change in the mode of administration and manage-

Session, and also with a view to such appeal to make application, as he may be advised, in the names of the defendants, to the

ment of the trust contemplated by the defenders, and the probable removal of the estate out of the jurisdiction of the Scotch Courts, which allegations are not seriously disputed by the defenders, it is clear that the pursuers have a very material title and interest to maintain that the administration of the estate should be continued to be carried on in Scotland.

But the pursuers have not only a clear title and interest to maintain the Scotch administration; they have, in the view I take of their position, a right by the law of Scotland to have that administration carried on in Scotland, without interference on the part of any foreign tribunal.

This trust is essentially a Scotch trust. It relates to the succession of a domiciled Scotchman. It must be administered in conformity with the provisions of a settlement framed according to the forms of Scotch conveyancing, and all disputes as to the terms of that settlement, or as to the distribution of the estate, must be ruled by the law of Scotland, as being the law of the domicil of the truster. The trustees, again, are all Scotch. The majority are permanently resident in Scotland, and they have been empowered to administer the estate in respect of a judgment or decree of the judge of the Commissary Court of Dumbarton, pronounced, under statutory authority, after due inquiry as to the domicil of the deceased, and whose jurisdiction in such matters is exclusive, and his judgment final. The estate, moreover, with the exception of a comparatively small amount, is locally situated in Scotland, and there are no debts due by the truster to any one in England.

Such being the position and character of the trust, it is difficult to conceive any combination of circumstances less calculated to require the interference of a foreign Court with the Scotch administration. There is truly nothing foreign about the estate and the trust. Even the infant plaintiff in the Chancery proceedings is the son of a Scotchman, one of the trustees; but he has for the present apparently become the unconscious instrument for originating an unfortunate family litigation, under the direction of what is called a "next friend," who seems to stand in the very peculiar position of having instituted proceedings for bringing the Scotch trust into Chancery, in the first instance without authority from any of the infants whose names he used, and for his own interest alone—as explained by your Lordship in the passage you have read from the judgment of the late Master of the Rolls.

Now, the main grounds in law on which it humbly appears to me that the pursuers are entitled to have this Scotch trust estate protected from the contemplated change of administration are—1st. That the whole estate has been placed, by the proceedings taken before the Sheriff Commissary, in terms of the statute of 1858, and by the judgments pronounced by him on the question of domicil, under the exclusive administration of the defenders; and that this administration, which includes, by the law of Scotland, both collection and distribution, must be carried on in Scotland; and, 2nd. That even if a similar question had been raised before the date of the Act of 1858 relative to a Scotch trust, in a case where ancillary administra-

H. L. (Sc.) 1885

EWING v. ORR EWING.

Court of Session for leave to appeal, &c. On the 22nd of May, 1884, a petition for leave to appeal was presented to the Court

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tion had been obtained in England relative to the estate there, and it had been proposed, as here, to call upon the Scotch executors to account to the Court of the ancillary administration for the administration of the estate in Scotland, in the way the defenders have been proceeded against, those Scotch executors would not, according to the ordinary and well-recognised rules of international law, have been entitled or bound to submit themselves to the jurisdiction of the foreign Court.

1. With reference to the first of these questions, I concur entirely in the very full and able exposition which has been given by your Lordship of the meaning and effect of the rules and regulations introduced by that statute for the amendment of the law relating to confirmation in Scotland, and for extending over the United Kingdom the effects of such confirmations, with reciprocal arrangements for England and Ireland. I feel it impossible to add anything to the weight of that exposition, and shall abstain from attempting to do so. But I think it right to say generally with reference to that statute, that I have always understood that one of its main objects was to remedy the inconveniences which were frequently experienced from the necessity of separate confirmation and letters of administration, as the case might be, in each portion of the United Kingdom in which a deceased party might happen to have property; and to have the whole moveable estate embraced in the inventory dealt with as a universitas, and placed under one administration, both for collection and distribution, in the hands of an administrator or administrators in the country of the ascertained domicil of the deceased.

Some of the inconveniences which thus arose were alluded to in the opinion of the late Lord Justice Clerk Hope in the case of the Marquis of Hastings, quoted in the opinion of the Lord Ordinary in this case, where his Lordship speaks of the advantages of having the estate of deceased parties managed as one universitas for collection and distribution, and of the inconveniences arising from having different administration in different countries, where he says, "In principle it is clear that the party in whom the title of administration is vested should be the same in both countries, since in the foreign country it is only a title for collection, and not for final distribution."

One effect, therefore, of the Act of 1858, as explained by your Lordship, was to introduce the principle of the rule referred to in the above extract into the working of Scotch confirmations, in the case of parties who died domiciled in Scotland, and to allow the whole estate included in the inventory to be administered as one universitas by the executors of the domicil, and within the Courts of the domicil, by the law of which it fell to be distributed.

2. But assuming that the question had required to be disposed of, apart from the provisions of the Act of 1858, and under the ordinary rules of international law applicable to such questions before 1858, I am of opinion with the Lord Ordinary that the pursuers are entitled to the protection they ask. On that point I entirely concur in the exposition of the law which the Lord

of Session, in the name of the appellants. On the 27th of May 1884, the Court postponed the consideration of the petition in

Ordinary has given us in his very learned opinion, and have therefore very little to add. It appears to me that the various authorities he has referred to are conclusive in favour of the soundness of the conclusion which his Lordship has arrived at; and it struck me as remarkable that in the course of the discussion before us there was no leading writer on international law referred to, as laying down any different rules from those on which his judgment has proceeded.

The case of Lady Baird Preston seemed to be relied on in support of the defenders' contention. I am, however, unable to adopt that view, for it humbly appears to me to be a judgment directly adverse in principle to the defenders. The judgment in that case was expressly limited to "the property held by Sir Robert Preston in England." The ground of judgment, as explained in the opinion of Lord Cottenham, was that "administration must be in the country in which possession is taken and held, under lawful authority, of the property of the deceased;" and as Lady Baird Preston had obtained possession of that property under letters of administration in England it was held that she could not be called upon to give it up to the Scotch trustees. Now, apply that rule to the circumstances of the present case. The defenders have taken possession, under a valid confirmation, of the whole moveable property in Scotland which belonged to the late Mr. Ewing, and are still in possession of that property for purposes of administration and distribution in Scotland. Upon the principle of the rule laid down by Lord Cottenham, they are bound to continue its administration in Scotland, under the jurisdiction of the Scotch Courts, and are not entitled to take the property out of Scotland, or hand over its administration to a foreign Court.

In the case of *Enohin* v. *Wylie*, to which the Lord Ordinary has referred for a statement of Lord Westbury's very distinct views of the law of nations, as quoted in his opinion, and which statement, although not expressly concurred in, is not dissented from either by Lord Cranworth or Lord Chelmsford; Lord Cranworth thus expresses himself:—"Personal property in this country belonging to a foreigner, or to a British subject domiciled abroad, can only be obtained, in the event of his death, through the medium of a representative in this country. If he has died intestate, administration will be granted here, limited to the personal estate in this country." (10 H. L. C. at p. 19.)

It was thus the situs of the property which, in the opinion of Lord Cranworth, as well as in that of Lord Cottenham, was held to regulate the right to administer that property; and the grant of administration was limited to the property situated in the country where administration was applied for; and when granted it was not in the power of any foreign tribunal to interfere with the administration. That is, I think, clear from the opinion and decision of Lord Cottenham in Lady Baird Preston's case, which is a distinct authority in favour of what the pursuers here contend for.

If the defenders, as your Lordship has remarked, had proposed, of their own accord, to remove the administration from Scotland to England,

H. L. (Sc.) 1885

EWING v. ORR EWING.

hoc statu, and in order to allow Malcolm Hart Orr Ewing and his guardian to sist themselves as defenders in the said action.

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there could have been no serious question as to the pursuers' right to have such a proceeding stopped; and the fact that the defenders have been called upon to take this step on an order issued by the Chancery Division, cannot, in my opinion, be held to deprive the pursuers of the redress they ask.

As regards the practice of Chancery, I agree with your Lordship that that cannot be held to rule or affect the present question. No case was referred to where such practice had, in a question of international law, been sanctioned or given effect to by the tribunals of any foreign country; and I am unable to see any good grounds on which, according to any sound rule of international law, extra-territorial effect could be given to it.

3. There is, however, another objection taken by the pursuers to the Chancery proceedings, which, if well founded, is, I think, conclusive in the pursuers' favour, viz., the terms of the Treaty of Union. The Lord Ordinary has referred to certain clauses in the Articles of Union bearing upon this question; and since the case came before us the pursuers have asked, and have been allowed, to add a plea in law to the record founded on the 19th article of that Treaty, which provides "That no causes in Scotland be cognoscible by the Court of Chancery, Queen's Bench, Common Pleas, or any other Court in Westminster Hall; and that the said Courts, or any other of the like nature, after the Union, shall have no power to cognosce, review, or alter the acts or sentences of the judicatories within Scotland, or stop the execution of the same," and which the pursuers maintain is or would be violated by the proceedings they complain of.

In order to dispose of this plea, it is necessary to keep clearly in view the precise position the defenders are placed in with regard to the trust estate in question, which, as I have already explained, is essentially a Scotch trust estate. The defenders have been authorized, by the judgment pronounced by the Commissary Judge of Dumbarton, after due inquiry, in terms of the statute, into the facts necessary to enable him to decide the question of the domicil of the deceased, to "uplift, receive, administer, and dispose of the personal estate and effects" of the late Mr. Ewing, "and to grant discharges thereof." This judgment is final and, the defenders have been, and are still, administering the estate under its authority, and according to the recognised rules of administration in this country, and subject to the jurisdiction of the Courts of Scotland. While so administering the estate in Scotland, proceedings are taken against them in the Chancery Division in name of a beneficiary and "next friend," in which a claim is made, "That the personal estate of the testator John Orr Ewing, deceased, may be *administered*, and that the trusts of his will or testament and codicils thereto, may be carried into execution by and under the direction of the Court," viz. the Chancery Division. And on the 29th of November, 1882, "the Court declares that the trusts of the will or testament, and codicils thereto, of the testator, John Orr Ewing, of Glasgow, North Britain, deceased, ought to be performed and carried into execution, and doth order and adjudge the same accordingly;"

On the 5th of August, 1884, the appellants presented this appeal to this House against the interlocutors of the 29th of February, and 11th and 12th of March, 1884.

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and a further and full inquiry and account is directed to be made in the Chancery Division with a view to a course of administration, as set out in the 10th article of the condescendence, and this order is served on the defenders in Scotland.

Here, therefore, there is a direct demand made by the plaintiffs upon the defenders to bring up a Scotch estate, which the defenders are in the course of administering under the jurisdiction and authority of the Courts in Scotland, for administration in the Court of Chancery; and in order that the whole affairs of the late Mr. Ewing may be inquired into, or, in other words, "cognosced" in that Court, and the administration removed from Scotland to England. That this is against the spirit and policy of the 19th article of the Treaty of Union cannot, in my opinion, admit of doubt. But I am also disposed to think that it comes under the words of the prohibition.

The subject matter in dispute is a Scotch estate which has been appointed to be administered in Scotland by Scotch trustees, and is being administered after the manner in which such administration is carried on in Scotland, as fully explained by your Lordship. In these circumstances the Court of Chancery calls upon these trustees to come and have the estate administered in Chancery according to the rules of that Court. This, in the view I take of it, is substantially an interference with a Scotch cause; and making allowance for the somewhat quaint phraseology of the time used in the 19th article, the proceeding appears to me to amount to an attempt to "cognosce" a Scotch cause in the Court of Chancery, and, in doing so, to "review or alter the acts of a judicatory within Scotland and stop the execution of the same," that is to stop the carrying out of the order for administration pronounced by the Sheriff Commissary of Dumbarton. On fair construction, therefore, I am of opinion that what is here sought to be prohibited is covered by the express words, in addition to being adverse to the spirit of the 19th article of the Treaty of Union.

LORD SHAND:—I am also clearly of opinion that the pursuers are entitled to succeed in their demand for decree of declarator and interdict in terms of the conclusions of the summons, and that in the very special circumstances of the case, the Court ought in the meantime, but I hope as a temporary measure only, to sequestrate the trust estate and appoint a judicial factor to execute the purposes of the trust exclusively in this country,—the factor being liable, as an officer of this Court, to account directly to the Court for his administration.

I feel myself relieved from the necessity of entering at length and in detail into the legal grounds on which the judgment of the Court is rested. Indeed, any attempt to do so would simply involve a repetition of much that has been already said. I entirely adopt the views expressed in the learned and exhaustive opinion which your Lordship has delivered, and the Lord Ordinary has supported his judgment by powerful reasoning and a full

H. L. (Sc.) 1885

EWING v. ORR EWING.

On the 18th of August, 1884, the respondents presented to this House a petition of incompetency against the appeal, pray-

citation of authorities in a careful and elaborate opinion, in which the various points maintained, excepting the special arguments founded on the terms of the Confirmation and Probate Act of 1858, are fully discussed. I shall content myself, in these circumstances, with some observations merely with the view of summarizing my opinion on the leading points on which, as it seems to me, the judgment must rest:—

1. The pursuers have made out a clear interest as well as a valid title to insist in their demand, that this Scotch trust estate should be administered in this country, which is at once the domicil of the deceased and the country within which to all intents and purposes the estate is situated, and where the trust purposes have to be executed. Fortunately for those who are interested in such estates the management in Scotland, extra-judicial in its character, is most simple and economical, the trustees being permitted and bound to administer the trust without interference by the Court, although entitled to the assistance of a law-agent. It is not said that any legal questions have arisen in the management requiring an appeal to the Court, or that in the administration of the trust anything has occurred to cause either embarrassment or expense or delay. It is quite obvious, on the other hand, and indeed it is not disputed, that if the trust estate is to be managed by the Court of Chancery in England, inconvenience, delay, and expense entirely unnecessary and unjustified by any exigency that has arisen will be the result. It is only necessary to read the Order of the Chancery Division of the High Court of Justice in England of the 29th of November last, directing detailed accounts and inquiries to be taken and made on the various matters therein enumerated in reference to the trust-estate, in order to see that considerable expense must be caused by the administration in that Court. The appointment of a separate agent for the trust in England, in addition to their law-agent in this country, and the fact that no payments can be made by the trustees without a reference to the Court of Chancery for authority, must necessarily cause embarrassment, expense, and delay; and it would be difficult, if indeed possible, to specify a single benefit or advantage which would be gained as the counterpart of these disadvantages.

2. The defenders have maintained that this Court is bound to follow the decision of the House of Lords, which confirms the order of the Court of Chancery, directing that the administration of the trust estate should be carried out in that Court, as an authority deciding the whole questions in dispute; and if there be a decree of the House of Lords which finally settles the matters raised by the present action, there would, of course, be an end to all further argument in the case. I agree with your Lordships and the Lord Ordinary in holding that the judgment of the House of Lords is not of that nature. That House, as a Court of final resort, has at different times, in appeals coming before it, to determine questions of purely Scotch law, questions of purely English law, and questions common to the law of both countries. It is only, however, in cases of this last class that it can be represented that the Courts alike in England and Scotland must regard the decisions

ing that the appeal might be dismissed as respects, inter alia, that it was not accompanied by a certificate of leave to appeal from

of the House of Lords as authoritatively binding on them. At one time the House of Lords may be dealing with a question of Scotch conveyancing, or of Scotch entail law, and it is obvious that decisions on these matters would be of authority only in this country. Again, a decision on a question arising under the Statute of Limitations in England, or dealing with a question in which the law of England has its own peculiar rules, as, for example, a question of servitude of light or the like, could not be regarded as settling any question of law in this country, while, on many questions of mercantile law or questions as to the interpretation of British statutes, the law announced in the House of Lords must receive effect throughout the whole United Kingdom. It seems to me to be obvious that in the decision founded on by which the House of Lords confirmed the order of the Court of Chancery their Lordships were dealing with a matter of purely English law and practice only. Their judgment related to the practice of the Court of Chancery, and proceeded to a great extent, if not entirely, on the peculiarities of that practice, and the length of time for which the practice had existed. I think this is practically stated in the opinions of Lord Blackburn and Lord Watson, and that in parts of the opinion of the Lord Chancellor the same view is presented. Should the decision in this case be appealed, the question to be determined will be not a matter of mere practice either of this Court or of the Court of Chancery, but whether, having regard to the special provisions of the Confirmation and Probate Act of 1858, or alternatively, according to sound and recognised principles of international law, the Courts of this country are bound to give effect to the practice of a foreign Court, in violation of these principles, and under which it is sought to transfer the entire administration of a Scotch trust estate duly administered by Scotch trustees, to another country, thereby causing serious expense and inconvenience to the whole parties interested. On that question it appears to me that the House of Lords, in affirming the order of the Court of Chancery, has as yet pronounced no opinion.

3. In one sense, it may be, and would be, inaccurate to speak of England as a foreign country, and the Courts of England as foreign Courts, for England and Scotland are parts of one kingdom; but there can, I think, be no doubt that, so far as the judicatories of this country are concerned, the principle stated by your Lordship is undoubtedly sound, that these are as independent of each other within their respective territories as if they were judicatories of two foreign states. Nothing can more clearly support that view than the provisions of Article 19 of the Treaty of Union, which not only provides for the maintenance and preservation of the Courts of this country, with the full authority which they have always claimed and exercised, but expressly enacts that "no cause in Scotland shall be cognoscible by the Court of Chancery, Queen's Bench, Common Pleas, or any other Courts in Westminster Hall," and that "the said Courts, or any others of the like nature, after the Union, shall have no power to cognize or alter the acts or sentences of the judicatories within Scotland, or stop the execution of the

H. L. (Sc.) 1885

EWING v. ORR EWING.

the Court below, and that it was not here taken by any person who had been made a party to the cause.

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same." The Judgments Extension Act, 31 & 32 Vict. c. 54, only confirms the view that the Courts of Scotland and England are as independent of each other as if they were judicatories of two foreign states. Before that Act was passed, the decrees of English Courts were examinable and examined in this country in the same way as the decrees of any foreign tribunal. Such decrees afforded only primâ facie evidence of the truth and justice of a pursuer's claim (*Southgate* v. *Montgomerie* 1837, 15 Court Sess. Cas. 1st Series, 507; *Whitehead* v. *Thompson* 1861, 23 Court Sess. Cas. 2nd Series, 772), and the judgments of Courts in this country were treated in the same way by the Courts in England. The Imperial Legislature has by the statute now referred to made no change, so far as regards the Court of Chancery in England, for the provisions of the statute are limited, so far as England is concerned, to judgments of Courts of Common Law in England, for debt, damages, or expenses; and the order of the Court of Chancery is thus to all intents in the same position as the decree of a foreign Court.

4. Assuming, then, that the order of the Court of Chancery is to be regarded as of the same authority as an order of the Court of France, or any other foreign country, the question arises, to what extent ought this Court to give effect to it? The answer to be given appears to me to be very clear. The laws of all civilized states recognise the existence of an ancillary administration of the estates of a deceased as extending over the property of the deceased situated within the foreign territory, while the principal administration belongs to the country of the domicil of the deceased, according to the law of which all questions of succession must be determined. The Court of Chancery stands quite alone in its rule or practice, by which the principal administration is, I may say, appropriated, although the estate and domicil of the deceased are situated in another country. It seems to me that this Court is bound to disregard any such practice, and when appealed to by parties whose interests are seriously prejudiced, ought not only to refuse its aid in the execution of an order such as is here complained of, but, if necessary, to grant a decree which will prevent that order from being carried into effect into this country. If one of the Supreme Courts in France or in the United States of America, were to grant an order for the transference of the whole funds of a Scotch trust estate to the territory of that Court, even when the domicil and the estate of the deceased and the domicil of the trustees were all in this country—a supposition, perhaps, scarcely admissible, for in those countries it is clear that the principles of international law on this subject are carefully observed—I cannot doubt that this Court would decline to give effect to the order, and would, by the necessary order or decree, support the executors or trustees of the deceased in maintaining their right to administer the trust in this country, and I should be surprised to learn that the Courts in England would act differently. I see no reason for holding that the order of the Court of Chancery is to receive any higher effect than the order of the foreign Court in the case supposed. It appears to me farther, that, apart from

On the 13th of November, 1884, the Appeal Committee dismissed this petition on the ground that in the present case the appeal was not incompetent.

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the stream of authorities on the principles of international law to which the Lord Ordinary has referred, and which are conclusive of the matter, the case of *Preston* v. *Melville* (2 Rob. App. 88) a decision in the House of Lords in a question appealed from the Courts in Scotland, is a direct authority in favour of the pursuers' contention. In that case, possession of the deceased's personal estate in England, taken and held under the English probate, was held to give right to the administration in England, at least in the first instance. It was so held although the domicil of the deceased and the principal administration were in this country. Lord Cottenham, while holding that the administration of the estate must remain in the first instance in England, added, however, that, "If after such administration shall have been completed any surplus should remain, and it shall appear that there are trusts to be performed in Scotland to which it was devoted by Sir Robert Preston, it will be for the Court of Chancery to consider whether such surplus ought or ought not to be paid to the pursuers" (the trustees acting under the deceased's settlement in Scotland, the country of the deceased's domicil), "for the purpose of being applied in the performance of such trusts." In a subsequent part of the judgment his Lordship refers to the right of the trustees to the funds in England as a right which will not emerge "until the administration shall have been completed in England, and the surplus ascertained." In the end the funds which the deceased had directed to be applied in the purchase of lands to be entailed in Scotland were disentailed in an application which was brought originally before myself, as Lord Ordinary, and was ultimately disposed of by a Court of seven judges (see Bruce Petitioner, March 6, 1874, 1 Court Sess. Cas. 4th Series, 740), and the money was ultimately directed to be paid over to the heir of entail in possession, the son, Robert Preston Bruce, in whose favour the decree of disentail had been granted, by an order by Vice-Chancellor Malins, a copy of whose judgment to that effect is now before me, dated the 20th of June, 1874. If the mere fact that the funds were situated in England, and that the title of administration was therefore taken out in that country, gave the right of administration there, it follows, à fortiori, in such a case as the present—where not only the funds or estate sought to be removed from Scotland and situated there, are held under the Scotch title of confirmation, but where Scotland is the country of the deceased's domicil, and therefore the country of the principal administration in which, indeed, he directed his trust purposes to be fulfilled,—that this Court, and, as it humbly appears to me, the House of Lords, following their decision in the case of Preston, must order that the estate of the deceased in Scotland ought to be administered by the defenders, by virtue of the decree of confirmation obtained by them from the Commissary Court. Indeed, the very words of the order of the House of Lords in the case of Preston might safely and properly be adopted in this case, altering only the names of the

H. L. (Sc.) 1885

EWING v. ORR EWING.

April 27, 28, 30; May 1. *Rigby*, Q.C., and *W. C. Smith* (with them *Romer*, Q.C., and *Henry Fellowes*), for the appellants:—

The trustees are in a very unfortunate position. In Scotland

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parties, and substituting the term "decree of confirmation" for "letters of administration."

5. But, for the reason fully stated by your Lordship, I am further of opinion that even the principle of ancillary administration which applies in the case of foreign states, and which held good as between England and this country prior to 1858, has no longer application. The effect of the Confirmation and Probate Act of 1858 has been, I think, to do away entirely with the ancillary administration of trust-estates, as between Scotland and England, so that the country or domicil of the deceased, in which either the confirmation or the letters of probate, as the case may be, are taken out, is now not only the principal but the sole place of administration of the estate. It seems to me to be the result of the provisions of that statute that creditors, legatees, heirs, or next of kin, claiming an interest in a trust estate, must have recourse to the country of the deceased's domicil in which the estate is being administered under the title there taken out. It is to be observed that the terms of this statute with reference to the effect of the title of administration as distinguished from the decree fixing the domicil of the deceased, do not appear to have been the subject of argument in the House of Lords in the appeal from the order of the Court of Chancery, and were not specially adverted to before the Lord Ordinary. The provisions of the statute and the terms of the schedule containing the forms of decrees to be granted by commissaries seem to me to make it clear that the title to administer the whole estate of the deceased, in the case of a person who dies domiciled in England, is contained in the letters of probate, granted in England, while in the case of a person dying domiciled in Scotland, the title to administer is contained in the confirmation by the commissary. I refrain from a reference to the different sections of the Act of Parliament, for these have been already adverted to by your Lordship. I will only observe that the terms of the decree of confirmation seem to be conclusive, for the form of that decree is a narrative, that the executor has "given upon oath an inventory of the personal estate and effects of the said E. F. at the time of his death situated in Scotland (*or situated in Scotland and England, or situated in Scotland and Ireland, or situated in Scotland, England, and Ireland, as the case may be*), amounting in value to pounds, which inventory has likewise been recorded in my Court-Books of date , and he has likewise found caution for his acts and intromissions as executor," and the effectual operative part of the decree gives full power to the executor "to uplift, receive, administer, and dispose of the said personal estate and effects,—that is the effects in all the three countries,—and grant discharges thereof," &c., provided always, "that he shall render just count and reckoning for his intromissions therewith, when and where the same shall be legally required,"—a clause which, it may be observed in passing, is analogous to the clause in letters of probate on which Lord Cottenham's

they are liable to contempt if they obey the English Court, and if they obey the Scotch Courts they are liable in England. The observations in the case of *Preston* v. *Melville* were founded. The seal of the Court of Probate is an official formality only designed to give debtors the security of knowing that the decree of confirmation is genuine, and has been recorded as such in the Registry of Probates. It seems to be expedient and desirable, so far as regards the whole of the United Kingdom, that creditors, legatees, and others, should be required to resort to that part of the kingdom in which the deceased had his domicil, as the place of administration, in place of having a principal and an ancillary administration in different parts of the kingdom, and this object has been, I think, effected by the statute.

6. It has been observed in argument, that if there had been an administration suit in this country, or anything equivalent to it before the proceedings in the Court of Chancery were initiated, the decision of the Court of Chancery would probably have been different, and that respect would have been given to the fact that the estate was already the subject of legal proceedings in this country. I have no means of forming an opinion, whether even in that case the Court of Chancery would not still have granted an order for the administration of the estate by that Court; but it must be observed that no such proceeding as an administration suit, such as is common in the Court of Chancery, is known in this country. An action of accounting, or, as it is frequently called, of count, reckoning, and payment, can only be maintained when there is really a refusal or failure on the part of the trustees to account, or a necessity for litigation to settle legal questions which have arisen. If, then, the absence of an administration suit in this country is a reason for the Court of Chancery in England undertaking the administration of Scotch trust-estates, it would appear to follow that, provided the trustees happen to be within the jurisdiction of the Court by temporary residence, or to be liable to service under the Rules of the Court of Chancery, there will be nothing to prevent the transference of the administration of proper Scotch trust-estates from this country to England at the suit of any one who can substantiate an interest in the estate.

Again, it is said that the Court of Chancery acts in personam, and so will compel a defendant within its territory to fulfil his duties, or rather, his legal obligations. I venture humbly to think that this is no peculiarity of the Court of Chancery. I apprehend that the Courts of this country act in the same way, and on the same principle. In every action for the payment of money, or the performance of some act by a defendant, the Court acts in personam, and in order to compel the fulfilment of a legal duty or obligation. But to take the case on hand, the carrying out of that principle cannot dispense with the necessity for the Court having jurisdiction to grant the decree asked on recognised principles of international law; and at least this must be so where the decree is to receive effect in another country. If the duty and legal obligation of a defendant trustee and executor be that of administering a Scotch executry or trust estate in Scotland, and he is not only ready and willing to perform that duty, but is in due course of doing so, the fact that

H. L. (Sc.) 1885

EWING v. ORR EWING.

trustees have also been divested by sequestration of the whole estate, though not said to be guilty of any misconduct.

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the Court of Chancery proceeds in personam seems to afford no reason or principle for destroying the existing obligation to account to the proper Courts in the proper country of administration, and creating a new obligation to remove the whole administration to another country. This may, no doubt, be characterised as a proceeding in personam, because the order of the Court may be enforced by diligence against the person; but if the order itself be one in violation of sound principles of international law, the proceeding in personam becomes one of might, and not of right, and the order is one which will be properly disregarded when it is sought to be enforced or carried into effect in another country. The Courts of this country in such cases, though proceeding in personam, have been in use invariably to decline to undertake or to order administration in Scotland, and to require that resort shall be had to the country of the domicil of the deceased in which the executor's title has been completed, and where the administration is being properly carried on. The case of course would be different if executors or trustees were altogether evading the duty of administration and accounting even before the Courts in the country of the domicil and estate of the deceased; but there is no case of that kind justifying and requiring, it may be, a special remedy now before the Court.

7. A special argument founded on the terms of article 19th of the Treaty of Union, which has been already quoted, was submitted by the pursuers. The case is in my humble judgment clear on the other grounds already stated. But on this point I must add that I think the argument maintained by the pursuers is sound, and that I concur in the opinion of my brother Lord Mure. The proceeding of the Court of Chancery is certainly directed against the spirit of the clause of the Treaty which provides, as already noticed, that "No cause in Scotland shall be cognoscible by the Court of Chancery, Queen's Bench, Common Pleas, or any other Courts in Westminster Hall, and that the said Courts, or any other of the like nature after the Union, shall have no power to cognise or alter the acts or sentences of the judicatories within Scotland, or stop the execution of the same." The defenders say that no "cause" within the meaning of the treaty is being cognosced by the Court of Chancery, because no litigated question the subject of a cause had arisen in this country when the administration order was pronounced. It appears to me that this is too narrow a view of the terms of the provision. The term "cause" in the provision of the Treaty includes, in my opinion, questions of legal right on which a dispute has arisen, although it may not actually be already the subject of an existing litigation in this country. If an administration suit such as exists in the Court of Chancery had been a known form of proceeding in this country, and had been instituted in the case of this trust before the proceedings in the Court of Chancery, it appears to me the words of the Treaty would have directly applied to the case, and that the Court of Chancery would in that case be attempting to take up and cognosce a cause in Scotland. The circumstance that the administration is happily carried on without such a

The judgment of the House of the 30th of November, 1883, if not res judicata, at least is a binding authority, and certainly ought to be so, where the action is at the instance of persons who took part in the former proceedings. [EARL OF SELBORNE, L.C.:— The doctrine in the English case may be correct, but I do not think it ought to bind the House sitting as a Scotch Court. The Scottish Courts having concurrent jurisdiction, and having no subordination to the English Court, think this is the best thing for the general interests, and being asked by the majority of the beneficiaries, ought this House to interfere with what has been practically done, even if it dissents from the decerniture in terms of the conclusions of the summons?] If what would be called a foreign Court was first seized of a matter it was not in accordance with the general principles of international law, that another Court should at once proceed to nullify those proceedings. No doubt the Court below had power to sequestrate the estate, but such a proceeding was not authorized by any decision, nor was it done for the good of the estate, but on the ground that there had been an excess of the English jurisdiction. It remains for this House, sitting as a Scotch Court, to examine what grounds there are for the fears entertained by the Scotch Courts; and at least the appellants must be protected from the conflict of law. Neither the authorities nor the statutes established the doctrine, that the Courts of the deceased's domicil had exclusive jurisdiction to administer the deceased's personalty.

In *Harvey* v. *Richards* (1) Mr. Justice Story said (2): "Upon the whole my judgment is, that a Court of Equity here has authority to decree distribution in cases like the present, according to the lex domicilii, upon the application of the legatees, or the next

judicial process or proceeding does not, in my opinion, make a difference in principle. The cause which the Court of Chancery seek to cognosce is essentially a Scotch cause, or, in the words of the Treaty, "a cause in Scotland," and the order of the Court of Chancery is substantially in effect "to stop the execution" of the decree of comfirmation of the Commissary of Dumbarton, which authorizes the defenders to administer and dispose of the executry estate in this country, subject to their obligations to account to the Courts of Scotland for their acts and intromissions.

(1) 1 Mason, 380.

(2) 1 Mason, at p. 429: see Story's Conflict of Laws, s. 513, and Story's Equity Jurisprudence, ss. 588, 589.

H. L. (Sc.) 1885 EWING v. ORR EWING.

of kin, or other competent parties; that whether it will decree distribution must depend upon the whole circumstances of each case; and that it is incumbent on those, who resist the distribution, to establish the case, that it may work injustice or public mischief. This doctrine is, as I think, sustained by principles of public policy, and is perfectly consistent with international comity." In *Peters* v. *Martin* (1) it was held that an executor of an English will relating solely to English property, being resident in Scotland, may be sued for implement in the Court of Session: see also *Ferguson* v. *Douglas Heron & Company* (2); McLaren on Wills, vol. i. p. 49; *Cruikshank* v. *Cruikshank* (1843) (3); and dicta of Lord Moncreiff in *Munro* v. *Graham* (4); *South Eastern Railway* v. *Brogden* (5). And *Dawson's Trustees* v. *Maclean* (6) shewed that the principles which guided the Scottish Courts was, that where a prior action in England had been commenced the Courts would refuse to grant interdict to prevent the first action being proceeded with.

As to the Act of Union. There was no cause coming under the 19th Article of Union, pending in Scotland, when the litigation arose in England and therefore it was not relevant to the question raised: contrast, on this point, *Kennedy* v. *Earl of Cassillis* (7) with *Bushby* v. *Munday* (8) and Lord Brougham in *Johnstone* v. *Beattie* (9).

They submitted that the interlocutors appealed from should not be allowed to stand, and that the grounds of the judgments could not be substantiated by the circumstances of the case. They also commented upon Story's Eq. Jur. (11th ed.), 588, 589; Story's Confl. of Laws, s. 513; Mackay's Prac. Court of Session, vol. i. p. 274; Wharton's Confl. of Laws, ss. 639, 640; *Johnston* v. *Jackson* (10); *Dawes* v. *Head* (11); *Mackey* v. *Coxe* (12);

(1) 4 Court Sess. Cas. 1st Series, 108.
(2) 3 Paton's Appeals, at pp. 506, 510.
(3) 5 Court Sess. Cas. 2nd Series, 733.
(4) 1839. 1 Court Sess. Cas. 2nd Series, at p. 1154.
(5) 3 Mac. & G. 8.
(6) Feb. 4, 1860. 22 Court Sess. Cas. 2nd Series, 685, at p. 693.
(7) 1818. 2 Sw. 313.
(8) 1821. 5 Maddock, 297.
(9) 1843. 10 Cl. & F. at p. 152.
(10) 1876. 21 Amer. Reports, 285.
(11) 3 Pick. 145.
(12) 18 How. (U.S.) 100.

Carmichael v. *Ray* (1); *Scott* v. *Elliott* (2); *Maclachlan* v. *Meiklam* (3).

Sir *F. Herschell*, S.G., and *J. P. B. Robertson* (with them *W. G. Lemon*):—

This was a Scotch trust settlement by a Scotch truster. The trustees were Scotchmen, and the bulk of the estate was situated in Scotland, and the majority of the beneficiaries brought this action to ensure the management and disposal of the estate in Scotland, as they considered it was better for them that it should be administered in Scotland. It was a matter perfectly competent to the Scotch Courts, if they considered it for the benefit of the estate and on the request of the beneficiaries, to order Scotch administration, and was not in anywise in conflict with any decision of the English Court of Chancery. The meaning of the judgment of the Court below was that both the Scotch and English jurisdictions were perfectly independent of one another. The respondents did not dispute the right of the Court of Chancery to make the order of the 29th of October, 1882; but the question was whether a convenient forum was to be ousted in favour of one, admittedly not so convenient. *Peters* v. *Martin* (4) shewed the strong view taken by the Scotch Courts, that where the personalty of the testator is situated the administration and questions arising out of it ought as a "matter of expediency" to be settled there.

In answer to a question of the Lord Chancellor (5), they stated that, assuming some part of the decerniture in terms of the declaratory conclusions of the summons was expunged from the principal interlocutor, but that part as to sequestration and the appointment of the judicial factor was to remain, there would be no question as to the infant plaintiff or his next friend coming in at any time to examine the accounts, &c., although not a party to this action. They submitted that though the Court below might have done something less, yet, the object they had was a legiti-

(1) 5 Tred. 365.
(2) Mor. 4845.
(3) 19 Court Sess. Cas. 2nd Series 960; 24 Beav. 100.
(4) 4 Court Sess. Cas. 1st Series (2nd ed.) 108.
(5) The Earl of Selborne.

H. L. (Sc.) 1885 EWING v. ORR EWING.

mate one, and therefore on the whole the judgments appealed from ought to be affirmed.

[Their further arguments are dealt with in the opinions of the Law Peers.]

Rigby, Q.C., in reply.

The House took time for consideration.

July 24. EARL of SELBORNE :—

The appellants in this case are trustees under the will of John Orr Ewing, a testator who died on the 15th of April, 1878, domiciled in Scotland, and leaving a very large personal estate, estimated at more than £460,000, of which all but £25,000 was in Scotland. The respondents are four of the residuary legatees under the will. When the Scottish suit, out of which this appeal arises, and in which the respondents are pursuers and the appellants are defenders, was commenced (the 5th of July, 1883), another suit was already pending in England, in which Malcolm Hart Orr Ewing, another of the residuary legatees (an infant suing by his next friend), was plaintiff and the appellants were defendants ; and in which the respondents (though not defendants on the record) had, for the protection of their own interests, intervened. A decree had been made in that suit, for a general administration of the testator's estate under the direction of the Chancery Division of the English High Court of Justice, by the Court of Appeal, on the 29th of November, 1882. The infant plaintiff was resident in England, and it had been found, upon inquiry by the English Court, that the prosecution of that suit would be for his benefit. Of the defendants, the trustees, two were permanently and one occasionally resident in England. These three were all served with the process of the English Court, while personally within its jurisdiction. The other three ordinarily resided in Scotland, and were there served according to the rules of procedure of the English Court. They appeared to and joined in defending the suit, without raising any question as to the propriety of that service.

From the English decree of the 29th of November, 1882, there

was an appeal by the defendants, the trustees (now also appellants here), to your Lordships' House. They submitted that the English Court had no jurisdiction in the case, and that, if there was jurisdiction, it ought not to have been exercised. Your Lordships were of a contrary opinion, and dismissed the appeal; and it cannot, in my opinion, admit of any doubt that your Lordships' adjudication on that appeal is now absolutely conclusive upon both the points so raised. Nor is it correct to represent the question of jurisdiction, then determined, as depending upon the mere procedure and practice of the English Court without reference to general principles; though the other question, whether the jurisdiction had been rightly exercised, undoubtedly did so. I will not repeat what was then said, though to all that I myself said, after carefully reconsidering it, I adhere. That decision turned upon the doctrine of trusts, and upon the authority of a Court of Equity to act in personam against trustees, personally present within and subject to its jurisdiction, whatever may be the situs of the subject-matter of the trust, or the domicil of any deceased person by whom (whether by deed inter vivos or by testamentary instrument), that trust might have been created.

A decision of this House, in an English case, ought to be held conclusive in Scotland, as well as England, as to the questions of English law and English jurisdiction which it determined. It cannot, of course, conclude any question of Scottish law, or as to the jurisdiction of any Scottish Court in Scotland. So far as it may proceed upon principles of general jurisprudence, it ought to have weight in Scotland; as a similar judgment of this House on a Scotch appeal ought to have weight in England. If, however, it can be shewn that by any positive law of Scotland, or according to authorities having the force of law in that country, a different view of the proper interpretation, extent, or application of those principles prevails there, the opinions on those subjects, expressed by noble and learned Lords when giving judgment on an English appeal ought not to be held conclusive in Scotland. When a Scottish decision, in apparent conflict with them, is brought to the bar of this House, the first duty of your Lordships must (I conceive) be, to ascertain, whether there is any settled rule of Scottish law, requiring or justifying that decision.

H. L. (Sc.) 1885 EWING v. ORR EWING. Earl of Selborne.

If not, it may still be open to the House to reconsider the points raised, in any new light which may be presented by the view of them taken in the Scottish Court.

It is now proper for me to state the effect of the principal interlocutor under appeal. The Inner House (recalling in form, but only modifying in substance, the interlocutor of the Lord Ordinary) has, in the first place, adopted and affirmed the declaratory conclusions of the summons. [His Lordship read them.] That Court has also granted an interdict, which appears to me to depend partly, though not wholly, upon those conclusions. Beyond this, it has exercised the unquestionable jurisdiction of the Court of Session over the parties and the subject of the suit, by sequestrating the whole moveable estate of the testator (that part of it which was not in Scotland at the testator's death having been afterwards brought within their jurisdiction), and appointing a judicial factor to take possession of and administer it, with all usual powers, till the further orders of the Court; suspending also, for the present, and till the further orders of the Court, all action on the part of the defenders, the trustees, in the administration and disposal of the estate. The first question for consideration is, whether the decerniture in terms of the declaratory conclusions of the summons is, or is not, correct?

That decerniture appears to me to be not only inconsistent with, but contradictory to, the decision of your Lordships' House upon the former appeal from the English decree. It declares (in effect) that the trustees, the appellants, are to be treated by the Court of Session as wrongdoers in Scotland, and as violating their trust, if they submit to and obey, in England, the decree of the English Court which was affirmed by your Lordships' House.

If it were necessary to enter into the question whether there may not have been, in this case, some excess of its own jurisdiction, on the part of the Court of Session, I should be disposed to say that, although the Courts of any country may affirm their own competence, and may decline to give effect to the proceedings or orders of a foreign Court, they have no authority to determine the extent or limits of the jurisdiction of that foreign Court within its proper territory. They may be entitled to

exercise all powers which they possess, byway of injunction or interdict, against a plaintiff or actor in a foreign suit, when within their jurisdiction; so as to restrain him from further proceeding in the foreign forum (as was done by the Court of Session in *Young* v. *Barclay* (1)), on the same principles on which English Courts of Equity were accustomed to restrain the prosecution of actions at common law. But there is neither principle nor precedent, (that I am aware of,) for restraining a defendant, sued in a foreign Court by a plaintiff not capable of being enjoined or interdicted, (or not enjoined or interdicted in fact,) from obeying, while within the foreign jurisdiction, the orders, lawful according to the lex loci, of that foreign Court.

Without dwelling further on that point, I propose to examine the reasons assigned for the declarator in the present case. The first declaration seems to assume that there is something in the terms of the trust created by John Orr Ewing's will prohibitory of, or repugnant to, any administration of the trust estate elsewhere than in Scotland; and the Lord President has treated the pursuers' demand as, for that reason, ex debito justitiæ; saying, "If the defenders, as trustees and executors, had voluntarily proposed to remove the estate out of Scotland, for the purpose of carrying on the administration elsewhere, it will hardly be disputed that the pursuers would have been entitled, by interdict, to prevent this being done." For that view I am unable to discover any foundation in the terms of the trust disposition and settlement. It is true that the trust is created by a Scotch deed, and is technically a Scotch trust. But there are no words requiring the administration of the funds belonging to the residuary estate, when realized by the trustees, to be in Scotland only; on the contrary, the trustees are authorized to invest the whole or any part of those funds in real securities (not restrained to Scotland), or in personal securities of certain specified kinds, in any part of Great Britain or Ireland, or of the British colonies or dominions. If, in the honest exercise of those powers, they had invested those funds in English securities, they would have been acting in accordance with their trust; and I do not understand on what principle they could have been interdicted from so doing.

(1) May 27, 1846. 8 Court of Sess. Cas. 2nd Series, p. 774.

H. L. (Sc.) 1885 EWING v. ORR EWING. Earl of Selborne.

The fact that they have not done so cannot alter the terms of the trust, or justify a declaration not warranted thereby.

In support of the remaining declarations, the Inner House seems to have mainly relied upon the reasons alleged in the opinion of the learned Lord Ordinary. These, and the Scottish and American authorities to which the Lord Ordinary referred, turned partly upon the doctrine of domicil, and partly on that of principal and ancillary administrations.

So far as relates to domicil, it has always appeared to me to be clear, that the domicil of a deceased testator or intestate cannot, in principle, furnish any governing or necessary rule, except for the purpose of determining the succession to moveable estate. For that purpose, recourse must be had, not always or necessarily to the Courts, but always and necessarily to the law, of the domicil. The succession being once ascertained, the rights resulting therefrom belong to, and follow the person of, the living successor, and not the dead predecessor. It has never been held that the forum, in which such rights may be vindicated, depends on the domicil (as distinguished from the place of residence for the time being, which is sometimes inaccurately so denominated) either of the plaintiff or of the defendant, in any action or suit; and if the domicil of the living man, whose rights and liabilities are in question, is for that purpose immaterial, I am unable to understand how the place in which those rights are to be protected, or those liabilities enforced, can necessarily depend upon the domicil of the deceased.

Lord Westbury did, indeed, in the English case of *Enohin* v. *Wylie* (1), express an opinion (unsupported, so far as I can see, by any other authority, and inconsistent, as I read them, with the general tenor both of the English, and of the Scottish, and even of the American authorities), to this effect, that "the Court of the domicil is the forum concursus to which the legatees under the will of a testator, or the parties entitled to the distribution of the assets of an intestate, are *required* to resort." He said more to the same effect in other passages of his opinion; and he would have thought it right, (but for the conduct of some of the parties,) to send to Russia English assets, in the hands of an English

(1) 10 H. L. C. at p. 13.

administrator, of an Englishman who died domiciled in Russia, for distribution by the Russian Courts; although in that case all reasons of convenience, if proper to be regarded, appeared to be the other way. Lord Fraser and Lord Mure ascribe to this opinion greater weight (apparently) than to the late decision, also in an English case, of your Lordships' House. But, as was there pointed out (1), the majority of the Lords who decided that appeal of *Enohin* v. *Wylie* (2) (Lord Cranworth and Lord Chelmsford) dissented from Lord Westbury's opinion. Lord Mure, indeed, thinks that they did not dissent from it; which induces me to quote what they actually said. Lord Cranworth (3) said that, where there is a will of a person domiciled abroad, "and probate of it has been obtained here, the duty of the Court in administering the property, supposing a suit to be instituted for its administration, is to ascertain who, by the law of the domicil, are entitled under the will, and, that being ascertained, to distribute the property accordingly. The duty of administation is to be discharged by the Courts of this country, though in the performance of that duty they will be guided by the law of the domicil." Lord Chelmsford (4), after stating the circumstances, said, "Why the property should be remitted to the forum of the domicil, in order that it shall be sent back again to be distributed, and why the Court should be incompetent to act effectively and finally in the suit which has been instituted, by decreeing a distribution amongst the several persons entitled, and transmitting to Russia the shares of the next of kin resident there, I am unable to comprehend."

The other point, as to principal and ancillary administrations, seems to me to be not germane to the present case. The authorities upon it, both British and American, relate to the proper consequences and effects of the title and office of legal personal representative, conferred by a grant of probate or letters of administration, or by confirmation in Scotland; which always have reference to the situs of the moveable property of the deceased

(1) Nov. 30, 1883. *Ewing* v. *Orr Ewing*, 9 App. Cas. at p. 39.
(2) 10 H. L. C. at p. 13.
(3) April 3, 1862. 10 H. L. C. at p. 19.
(4) April 3, 1862. 10 H. L. C. at p. 24.

H. L. (Sc.) 1885 EWING v. ORR EWING. Earl of Selborne.

person within the local jurisdiction of the Court making the grant. These questions usually arise when one person is principal and another "ancillary" executor or administrator. And here it may be convenient to observe that the word "administration" is capable of being, and is in fact often, used in three distinct senses, and that some confusion in certain parts of the reasoning of the learned judges in the Court below appears to have arisen from want of a sufficient discrimination between those senses. The first and most technical sense, is that of the official character of legal personal representative, conferred by the act of a Court of Probate or Confirmation. The second is that of the management and distribution by an executor or administrator (and in this sense the word is not less applicable to management by a trustee), extra curiam. The third is that of a judicial administration of the estate, under the decree or order of a competent Court, for the purpose of taking the accounts and superintending the management, and making a proper distribution among the persons entitled. It was in the first only of these three senses that Lord Cranworth used the word in the passage quoted by Lord Mure from *Enohin* v. *Wylie* (1): "Administration will be granted here, limited to the personal estate in this country;" from which the inference drawn by Lord Mure was that Lord Cranworth (and Lord Cottenham also in *Preston* v. *Melville* (2), to which case Lord Cranworth referred with approval) held "the situs of the property to regulate the right to administer that property." Doubtless in the first sense (that of the grant of probate or letters of administration by the forum rei sitæ)—but in that sense only—that inference is correct; but though correct, it is for the present purpose irrelevant. I can hardly suppose Lord Mure to have understood either Lord Cranworth or Lord Cottenham as meaning to exclude (contrary to the general current of English authorities) the power of the Courts of the domicil, at all events, to make a general decree for the administration (in the third sense above explained) of the whole estate of any testator or intestate who might have died leaving assets in several states or countries, in respect of which several grants of probate or

(1) April 3, 1862. 10 H. L. C. at p. 19.

(2) March 29, 1840. 8 Cl. & F. 1, at p. 12.

administration (whether principal or ancillary) might have been obtained: working out such a decree in the best way practicable as to assets not within the local jurisdiction.

In this case the fiduciary character is not divided. The same persons are legal personal representatives in both countries; and they are also trustees for the beneficiaries under the testator's will. The remedy (both in England and in Scotland) has been sought, not on the footing of those duties and liabilities which result from the official character of legal personal representative, but on that of trust, under the trust disposition and settlement. The distinction between a mere executor or administrator (whether acting under a principal or ancillary, a general or a limited, grant) and a trustee under a trust disposition, is well understood in the Courts both of Scotland and of England. It cannot make any difference as to the forum in such a case, whether the trustees, in whom the residuary estate is vested, are or not the same persons who, as executors, obtained probate or confirmation. The rights of the plaintiffs, (in both countries,) and the remedies against the defendants, ought to be precisely the same, so far as relates to the trust estate, whether the defendants were original, or afterwards assumed, trustees, or were or were not executors as well as trustees.

Having examined the authorities, both Scottish and American, which were referred to in the opinions of the learned judges of the Court of Session, and in the arguments at your Lordships' Bar, I will first refer to the Scottish authorities, which, as far as they go, must be of principal importance for the determination of this appeal.

There is a difference between the course of the Courts in England and Scotland respectively, as to the grounds which are held sufficient for a general judicial administration, at the instance either of fiduciaries or of beneficiaries. The Court of Session will not in either case interfere with the administration extra curiam, except for some special cause shewn. The English Court, on the other hand, regards the mere exoneration of fiduciaries from the risks and responsibilities of an administration extra curiam, and the better security for the interests of beneficiaries afforded by a judicial administration, as sufficient reasons (generally) for its

H. L. (Sc.) 1885 EWING v. ORR EWING. Earl of Selborne.

intervention. Which may be the better practice cannot now, or here, be determined. In each country, the rule to which its judges and suitors are accustomed may probably be preferred. It appears also that the doctrine of forum conveniens, which in England seldom comes into consideration when jurisdiction exists apart from service of process abroad, unless there is an actual competition of suits, is in Scotland carried further, and may prevent the exercise of jurisdiction when the Court is satisfied that the suit might have been brought, and effectively prosecuted in a more convenient forum, although this may not actually have been done. These, however, are in my judgment differences affecting, not the jurisdiction, but the lex fori, by which the Courts are to be governed in exercising, or declining to exercise it.

That a Scotch Court may act in personam, when the pursuer and the defender are within its jurisdiction, although the subject matter of the suit may not be so, seems indisputable. *Johnston* v. *Johnston* (1) is an instance, as old as 1579, where the subject-matter was real estate, beyond the jurisdiction. If, in the case of immoveables, the situs rei does not exclude the jurisdiction, there is no intelligible principle on which it can be held to be excluded by the mere situs, in the case of moveables.

Ferguson v. *Douglas* (2) was a case which came to the House of Lords in 1796. The pursuers there claimed against the estate of Andrew Grant, who had died domiciled in England (and whose assets do not appear to have been wholly or even partly in Scotland), not as being directly creditors of Andrew Grant himself, but as creditors of Baron Grant, of whose personal estate Andrew had been the representative. Andrew's estate was represented by trustees (defenders in the suit), who resided chiefly in England, and had taken out letters of administration in the Prerogative Court of Canterbury, but who do not appear to have obtained confirmation in Scotland. There was a suit pending in England for the administration of Andrew Grant's estate; and, as it was necessary that the liability, if any, of Andrew Grant for assets of his brother received by him, and not duly administered, should be established before the pursuers

(1) March 7, 1579. Mor. Dict. 4788; 1 Fol. Dic. 326; Colvil MS. p. 280.

(2) Nov. 11, 1796. 3 Pat. App. Cas. 503; Nov. 19, 1793. 11 Fac. Coll. 157.

could in any way substantiate their claim, the House of Lords held that they ought to go in and take such proceedings as they might be advised, under the English decree. But Lord Loughborough said (1): "I have no doubt as to the competency of the Court of Session, in a case where either the persons of executors, or effects of the deceased, are within their jurisdiction. No matter where the will was made or proved, the Court has full jurisdiction, and could carry their judgment into effect. And this might even be, where a will has reference to the law of England."

In *Morison* v. *Ker* (2) it was held that an English administrator, living in Scotland, might be sued there by next of kin for their distributive shares of the estate; and the action was sustained against the representative of such an English administrator, although he offered to appear to any suit which might be brought in England.

In *Peters* v. *Martin* (3), Martin, sole surviving executor and trustee under an English will (the property being situate partly in England and partly in colonies governed by English law), having come after the lapse of twenty years to reside in Scotland, was sued in the Court of Session by beneficiaries under the will, for implement of the trusts, on an allegation (the truth of which was admitted) that he had in his hands a balance of £7800, not then invested as directed by the will. Martin objected to the jurisdiction, on the ground that the action related solely to an English trust, and that "the implement of the will could only be judged of in an English Court, in which also he could get a discharge." The Lord Ordinary sustained the jurisdiction. Martin reclaimed, stating that he had filed a bill in the English Court of Chancery relative to the matter; and the Inner House, after suspending the case to see what might follow, "and it appearing that no effectual procedure had followed, and that no orders of the Court of Chancery could be enforced against the defender while in Scotland," adhered. Their Lordships, "while satisfied that the case ought, *as a matter of expediency*, to be settled in an English Court, held, that they could not deprive the

(1) 3 Pat. App. at p. 510.

(2) Feb. 25, 1790. Mor. Dict. 4601; 10 Fac. Col. 233.

(3) June 21, 1825. 4 Court Sess. Cas. 4th Series (1st ed.), p. 107, (2nd ed.), p. 108.

H. L. (Sc.) 1885 EWING v. ORR EWING. Earl of Selborne.

pursuers of their legal right to sue a party domiciled within their jurisdiction, and to obtain security for the balance in his hands." This case affords a good illustration of the difference between the doctrine of forum competens and that of forum conveniens.

In *Macmaster* v. *Stewart* (1), an action was brought in the Court of Session by residuary legatees under an English will, against parties domiciled (that is, as I understand it, resident) in Scotland, who had administered the will "which specially directed the English Court of Chancery to be the forum, in the event of legal discussion;" and "the administrators having, in obedience to an order of the Lord Ordinary, filed a bill in that Court, and it being ascertained by the opinion of counsel that they might be compelled to account, the Court *sisted further procedure, hoc statu.*" The Inner House adhered; holding that, as the Lord Ordinary had "only sisted procedure hoc statu," he had "adopted the most expedient course." But the Lord President Hope said: "If any improper delay is allowed by the defenders to occur in their accounting in England, it is open to the pursuers to go to the Lord Ordinary, and crave his Lordship to proceed here." And Lord Mackenzie:—"It may happen that circumstances may occur, before the close of the accounting in England, which will make it necessary to go on with the accounting here."

I readily accept the exposition of these, and some other Scottish authorities, which will be placed before your Lordships by my noble and learned friend, Lord Watson; especially as to the manner in which the doctrine of forum conveniens is understood and acted on in the Court of Session. But for the declaratory part of the principal interlocutor now under appeal, which affirms, not the greater convenience under the circumstances of this case, but the exclusive competency of the Scottish jurisdiction, I can find no support in these authorities, but rather the reverse.

Unless the learned judges in the Court below considered the decision of this House in *Preston* v. *Melville* (2), to be at variance

(1) June 17, 1834. 12 Court Sess. Cas. 1st Series, 731.
(2) March 29, 1841. 2 Rob. App. 88.

with, and practically to have overruled, these authorities, I can hardly understand the reliance which all of them, and especially Lord Deas, appear to have placed on that case. In the observations which I am about to make upon it, I shall do little more than enlarge what was said in this House in the English appeal of *Ewing* v. *Orr Ewing* (1).

Preston v. *Melville* (2) was a case of trust under the will of a Scottish testator, domiciled in Scotland, who left assets in England as well as Scotland. The trustees were not executors; Lady Baird Preston, who had been confirmed executrix as next of kin in Scotland, and had also taken out letters of administration in England, was not a trustee. Two suits for the administration of the English assets had been instituted, and were pending in the English Courts of Equity before the commencement of any proceedings in Scotland. In the first, the trustees were plaintiffs and the administratrix defendant; in the second, the administratrix was plaintiff and the trustees were defendants. The trustees, in this state of circumstances, raised an action for declarator and payment in the Court of Session, by which (the moveables in Scotland having been already transferred to them) they asked that it should be declared, that the whole goods and effects of the deceased held by the administratrix under the English letters of administration belonged to and ought to be vested in and transferred to the pursuers for the purposes of their trust; and that the pursuers' receipts and discharges would be a valid and sufficient discharge and exoneration to the administratrix of her whole intromissions; concluding for payment accordingly. The Court of Session decerned in terms of the declaratory conclusion of the libel, superseding (that is, postponing) the consideration of the rest. The House of Lords reversed that decree, and declared that the property of the testator in England ought to be administered by the appellant (the administratrix) by virtue of the letters of administration granted to her by the prerogative Court of Canterbury.

That reversal was plainly right; for it was beyond question, that the administratrix would not be discharged or exonerated in England by any payment over by her to the trustees, until all

(1) 9 App. Cas. 34; 22 Ch. D. 456. (2) March 29, 1841. 2 Rob. App. 88.

H. L. (Sc.) 1885 EWING v. ORR EWING. Earl of Selborne.

other claims, to which she might be liable in her character of legal personal representative in England, were satisfied; and that, until she was so discharged and exonerated, the English assets in her hands could not properly be treated as belonging to, or vested in, the trustees for the purposes of their trust. It was not less clear, that the English forum, in which the two administration suits between her and the trustees were pending, had proper jurisdiction to take the accounts of the estate, so as fully to discharge and exonerate her, and ascertain the clear residue (if any) subject to the trusts of the will; a thing which could not be done in the Scottish suit.

This is all that the House of Lords determined in *Preston* v. *Melville* (1); and it appears to me to be quite consistent with the earlier Scottish authorities, and with the English decision in *Ewing* v. *Orr Ewing* (2), and other similar cases.

Some words used by Lord Cottenham in *Preston* v. *Melville* (3): "the domicil regulates the right of succession, but the administration must be in the country in which possession is taken and held, under lawful authority, of the property of the deceased," seem to have been regarded by the Lord Ordinary as expressing "the position taken up by the pursuers in the present action." I cannot so regard them. The competition there was for possession of funds vested by the law of England in the administratrix (who claimed to retain them for the purposes of that administration for which she was accountable in England), by trustees, who had nothing whatever to do with her duties, and could not exonerate her from her liabilities; and who claimed possession of them for the purposes of a trust distinct from the duty which the administratrix had to perform. The only proceedings for judicial administration were those then pending in England. Lord Cottenham's words refer, as their whole context shews (4), not to any question of forensic jurisdiction or judicial administration, but to the title, and consequent duties and responsibilities in England, of an English executor or administrator as such.

Some observations of the Lord Justice Clerk Hope, in *Hast-*

(1) March 29, 1841. 2 Rob. App. 88.
(2) 9 App. Cas. 34; 22 Ch. D. 456.
(3) 2 Rob. App. at p. 105.
(4) 2 Rob. App. pp. 105–107.

ings v. *Hastings* (1) were cited by the Lord Ordinary, to which I must not omit to refer. That was a case of confirmation; the words of the learned judge: "unless there are some peculiar specialities or clear convenience, the *administration* is also to be that of the domicil," were used as to the principles which, in case of competition, ought to be acted on by and to guide the judgment of a Court of confirmation, and not as to any such question as that raised by the present case.

Some of the learned judges in the Court of Session appear to have thought two statutes relevant to the present question,—the Act of Union between England and Scotland, and the "Confirmation and Probate Act" of 1858. The Act of Union preserves to the Scottish Courts the same independence of the English Courts which they before possessed; and it leaves, e converso, the English Courts in full possession of their own independence also. In the present case the Scottish Court has acted (whether rightly or wrongly) in the exercise of its independent jurisdiction, and no English Court has interfered with anything which it has done. The English Court has done nothing which it might not have done, if the two kingdoms had never been united; and what it did could not possibly have been upheld by this House upon appeal, if it had been contrary to the Act of Union. A like argument from the Act of Union was advanced, for a like purpose, in *Johnstone* v. *Beattie*. Lord Brougham (who thought that the English Court had not properly exercised its jurisdiction in that case) expressed his opinion against it in strong terms (2), with the substance of which I agree, though I do not think it respectful to those from whom I differ to adopt that noble and learned Lord's language.

As to the Confirmation and Probate Act of 1858, I am unable to appreciate its bearing upon the present question. The argument, which was urged in the English case of *Ewing* v. *Orr Ewing* (3), that the appellants, by obtaining confirmation in Scotland, had become officers of a Scottish Court in such a way as to make them, for that reason, accountable to Scottish Courts alone, was disposed of by your Lordships in that case; and it was

(1) Feb. 12, 1852. 14 Court Sess. Cas. 2nd Series, at p. 489.

(2) May 26, 1843. 10 Cl. & F. 152.

(3) 9 App. Cas. 34; 22 Ch. D. 456.

H. L. (Sc.) 1885 EWING v. ORR EWING. Earl of Selborne.

not repeated at your Lordships' bar by the learned counsel for the present respondents, nor can I perceive that it was relied upon by any of the judges in the Court below. A similar argument as to an English administrator was advanced and was rejected by the Court of Session in *Morison* v. *Ker* (1).

The statute of 1858 was passed for the double object of simplifying the procedure necessary, in Scotland for confirmation, and in all parts of the United Kingdom for what it may be convenient to call ancillary administrations; and of enabling, in the latter class of cases, a single stamp, denoting the duty payable on the aggregate value of the whole personal estate within the United Kingdom, to be placed upon the principal grant, whether of probate or administration in England or Ireland, or of confirmation in Scotland; the latter object being purely fiscal. For the purposes of that Act, *and for those purposes only* (as is expressly provided by sect. 17), a statement of the domicil of the deceased person in Scotland, or in England or Ireland, on the face of any interlocutor of the Commissary Judge granting confirmation, or of any probate or letters of administration granted in England or Ireland, is made conclusive evidence; that is, it is to determine conclusively which shall be deemed the principal grant, on which the duty on the whole personal assets within the United Kingdom is to be paid, and which is to be followed, in the rest of the United Kingdom, by the procedure substituted by the Act for that previously in use. The substituted procedure is the sealing or indorsement of the instrument bearing the stamp on which the duty has been paid, by the proper Court, in each of the other parts of the United Kingdom. It is clear, that if, in any case, the domicil should happen to be erroneously stated on the face of the instrument so sealed or indorsed, all parties interested may assert their rights, and pursue their remedies, in any forum which would have been competent if that Act had never been made; nor is there anything to alter or take away any such rights or remedies when the domicil is correctly stated. The statute expressly says that the *effect* of a Scottish confirmation, when sealed under its provisions in England or Ireland, is to be the same "as if a probate, or letters of administration, as the case may be,

(1) Feb. 25, 1790. Mor. Dic. 4601; 10 Fac. Coll. 233.

had been granted by the Court of Probate," in those countries respectively.

I find, therefore, nothing, either in these statutes, or in the Scottish authorities, to warrant the declaratory part of the interlocutors now under appeal.

The American authorities cited in the Lord Ordinary's opinion relate mainly, if not wholly, to the consequences of principal (or "domestic,") and "ancillary" administrations, in some of the United States of America. In those states (see sect. 543*a*, added by Mr. Balch, the editor of 1873, to chapter 9 of Story's Equity Jurisprudence), there is a division of jurisdictions between their Probate Courts and Courts of Equity, materially different from that which prevails in England. It is impossible, in my judgment, to collect any binding rules of private international law from those authorities, or from the passages in certain French books, also referred to by the Lord Ordinary. The phrase "private international law" is liable to be misunderstood. It is a convenient expression for such rules as, in the jurisprudence of most civilised nations, are applied, ex comitate, to the solution of questions depending upon foreign status, foreign laws, or foreign contracts. But no law, binding proprio vigore upon any independent state, can be established by generalization from the jurisprudence of other nations. All such rules must yield to the lex loci whenever it differs from them; and, in point of fact, few (if any) such rules are universally accepted, without some modifications or variations, making it necessary to distinguish between the general principle and the forms and conditions of its local application. Even if the uniform practice of the Courts of the United States of America had been in accordance with the view taken by the Lord Ordinary, it would be no law for the Courts of England or Scotland, unless a similar practice were also found to prevail there. But I think it unnecessary to examine in detail the American authorities mentioned by the Lord Ordinary; because your Lordships need go no further than the opinion of Mr. Justice Story, to be satisfied that no such uniform practice does, in fact, prevail in the Courts of the United States.

Mr. Justice Story had occasion to consider some questions connected with this subject, judicially, in 1818, in the case of *Harvey* v.

H. L. (Sc.) 1885 EWING v. ORR EWING. Earl of Selborne.

Richards (1), and his judgment, which well repays perusal, is in accordance with the conclusions stated by him in the 9th chapter of his work on Equity Jurisprudence. In the earlier sections of that chapter, he recognises the doctrine of trusts as a generally sufficient foundation for the administration of assets by Courts of Equity. In sect. 588 he deals with the question, how far the Courts of a state granting an ancillary administration may properly exercise jurisdiction as to the distribution of the residue of the estate in the administrator's hands, after payment of all debts, &c. In sect. 589 he states the general result which he collects from the authorities :—"Courts of Equity of the country where the ancillary administration is granted (and other Courts, exercising a like jurisdiction in cases of administration), are not incompetent to act upon such matters, and to decree a final distribution of the assets to and among the various claimants having equities or rights in the funds, whatever may be their domicil, whether it be that of the testator or intestate, or be in some other foreign country. The question whether the Court, entertaining the suit for such a purpose, ought to decree such a distribution, or to remit the property to the forum of the domicile of the party deceased, is treated, not so much as a matter of jurisdiction, as of judicial discretion, dependent upon the particular circumstances of each case. There can be, and ought to be, no universal rule on the subject. But every nation is bound to lend the aid of its own judicial tribunals for the purpose of enforcing the rights of all persons having a title to the fund, when such interference will not be productive of injustice, or inconvenience, or conflicting equities, which may call upon such tribunals for abstinence in the exercise of their jurisdiction."

It may be observed, in passing, that this eminent jurist, in *Harvey* v. *Richards* (2), commented upon the words "principal" and "ancillary," when used with respect to administrations, as having no magic in them, and as not necessarily governed by domicil in their practical application. "I am yet to learn," (he said,) "what possible difference it can make in the rights of parties before the Court, whether the administration be a prin-

(1) 1 Mason's Cir. Ct. (U.S.) Reports, 381, at p. 406.

(2) 1 Mason (U.S. Reports, 2nd ed.), at pp. 414, 415.

cipal or an ancillary administration. They must stand upon the authority of the law to administer or deny relief, under all the circumstances of their case, and not upon a mere technical distinction of very recent origin."

If the views of Mr. Justice Story ought to be regarded, they seem to me to be consonant with the Scottish authorities, and with the English law also, so far at all events as the question of competency is concerned.

The conclusion at which I have arrived on this part of the case is, that the declaratory part of the principal interlocutor of the Inner House cannot be supported, and ought to be reversed.

But the question whether your Lordships ought also to reverse that part of the interlocutor which sequesters the estate, appoints a judicial factor, and suspends till further order the action of the appellants as trustees, appears to me to depend upon other considerations. As to this, it cannot be maintained that the Court of Session was bound to abstain from the exercise of its own independent and unquestionable jurisdiction over the persons of the trustees and the trust property, both being in Scotland, on the mere ground that a decree for administration had previously been made against the same trustees, and as to the same property, by an English Court. Their competency being undoubted, the question on this part of the case is, whether what they have done was right according to that principle of forum conveniens, which appears by the Scottish authorities generally (see *Ferguson* v. *Douglas* (1), *Peters* v. *Martin* (2), *Macmaster* v. *Stewart* (3) already cited, and also *Clements* v. *Macaulay* (4)), to be recognised by the law of Scotland.

I think it convenient, in the first instance to examine the question, as if the Court of Session had been able, according to its usual course and practice, to make, and had actually made, a decree for administration in Scotland, similar to and co-extensive with that made by the English Court.

That priority of suit would not alone be a sufficient reason in

(1) Nov. 11, 1796. 3 Pat. App. Cas. 503; Nov. 19, 1793. 11 Fac. Col. 157.

(2) Feb. 25, 1790. Mor. Dic. 4601; 10 Fac. Col. 233.

(3) June 17, 1834. 12 Court Sess. Cas. 1st Series, 731.

(4) March 16, 1866. 4 Court Sess. Cas. 3rd Series, at p. 592.

H. L. (Sc.) 1885 EWING v. ORR EWING. Earl of Selborne.

Scotland for leaving the parties to the English jurisdiction may, I think, be collected from the authorities. It is an element, no doubt, in the case; but I do not think it ought to prevail, if in other respects your Lordships are unable to say that the Scottish criterion of greater convenience has not been reasonably applied.

The Scottish jurisdiction has been invoked by the pursuers, who constitute the majority in number and interest (though the original proportion of interests may have been in some degree altered by what has already been done in the administration of the trust) of the beneficiaries under the testator's will.

The trust is Scottish in form; the testator was a domiciled Scotchman; if any questions should arise under the terms of the trust, Scottish law must be applied to their solution; the whole trust estate is, de facto, in Scotland; and neither the trustees nor the pursuers desire it to be removed from that country.

The views of the trustees, who are appellants here in obedience to the English Court, and who are suspended from all present action in Scotland by the interlocutors under appeal, may not, perhaps, now be very material; but, as long as they were at liberty to exercise their own judgment, they objected to, and resisted, the English judicial administration. All these circumstances being taken into consideration, I am unable to say that there is not such a primâ facie case of convenience in favour of a judicial administration in Scotland, as to throw upon the appellants the burden of proving the contrary.

The strongest reasons to the contrary which have been, or can be, alleged, appear to me to be these:—(1.) that the interlocutors are not equivalent to a decree for general administration; (2.) that they are such as would not have been pronounced, if the object had not been to displace the judicial administration in England; (3.) that the pursuers are open to personal exception, having intervened in the English suit; (4.) that the English plaintiff is not a party to the Scottish action, and that his interests will not be adequately protected, if the sequestration and the order for a judicial factor are allowed to stand.

To the first of these objections, it appears to me to be a sufficient answer, that the appointment of a judicial factor (whose duties and responsibilities are substantially the same as those of a

receiver in England) is, in effect, as long as it continues, a judicial administration; that the factor has given security, and will have to render regular accounts of his intromissions; and that all parties interested will be at liberty from time to time to apply to the Court of Session, as there may be occasion, as to any questions arising upon the factor's accounts, or otherwise relating to the sequestrated estate, or to their respective interests in the funds realized therefrom. So far as relates to the accounts or other liabilities exigible from the trustees, in respect of intromissions or defaults prior to the appointment of the judicial factor, the affirmance by your Lordships of this part of the interlocutors will not interfere with the substance of any rights or remedies of the English plaintiff against the trustees under the decree in the English suit.

The second objection is not, in my opinion, substantial. It may be true, that it is not the course of the Court of Session to interfere with the administration of a trust estate extra curiam by trustees, without special cause shewn. But, in the present case, the administration extra curiam has been interfered with, and to a great extent superseded by the English decree. The Court of Session therefore may, consistently with its general rule, treat this state of circumstances as adequate cause for the appointment of a judicial factor, when asked, as it is, by parties having sufficient interest, to exercise its jurisdiction so as to retain the general administration in what it deems to be the more convenient forum. I may not be so convinced that this was clearly ex debito justitiæ, as to have thought a different decision erroneous; but I am not prepared to overrule the judgment of the Court of Session on a point which I regard as one of practice more than of principle.

As to the third objection, the intervention of the pursuers, for certain purposes, in certain proceedings in the English suit, cannot, in my opinion, be a bar in Scotland to their present action, or to any proper relief to which, in that action, they may be entitled.

Lastly, with respect to the position of the English plaintiff, the objection that he is not made a party to the action in Scotland has been, for all necessary purposes of justice, removed by the

H. L. (Sc.) 1885 EWING v. ORR EWING. Earl of Selborne.

undertaking offered by the respondents' Counsel at your Lordships' Bar, that he, by his present or any future next friend, who may be recognised by the English Court as representing him for the purpose of the English suit, shall have notice of and be at liberty to attend the taking of the judicial factor's accounts, and to apply and be heard on all matters relative to the sequestered trust estate or the funds arising therefrom, for any purpose (claims for expenses included) which might be competent to the plaintiff if a party on the record. I propose that a declaration, conformable to that undertaking, should be embodied in the order to be now made by your Lordships.

I think that, in this way, the plaintiff's interest, so far as it may be affected by the sequestration and the judicial factor, will be adequately protected. In the English suit it will, of course, be open to the plaintiff, or to the appellants, to make such application to the Court as they may be advised, for the stay of any part of the proceedings under the directions contained in the decree, the prosecution of which the sequestration and the appointment of the judicial factor in Scotland (so long as they remain in force) may render impracticable or inexpedient; and it cannot be doubted that, on any such application, the English Court will do what is right. Nothing in your Lordships' order, or in that part of the interlocutors now under appeal which will be thereby affirmed, can interfere in any way with the power of the English Court to continue the prosecution of such accounts, inquiries, and other proceedings under the English decree, as may be for the infant plaintiff's benefit, and not inconsistent with the suspension of the ordinary powers of the trustees in Scotland during the continuance of the sequestration and the judicial factor; and also to give such directions as it may think fit as to any proceedings which it may deem proper to be taken in Scotland on behalf of the infant plaintiff, under the respondents' undertaking, or otherwise.

With respect to the interdict, as limited by the Inner House, I understand my noble and learned friend Lord Watson to think, that, with one slight exception, it may be understood in a sense not necessarily involving the principle of those declarations from which your Lordships dissent; and its practical operation is now

spent and exhausted. I am ready to defer to my noble and learned friend's opinion; which, however, I do not understand to extend to the prohibition of "*accounting*" (i.e., for the trust estate, or any part of it), "to any person or persons other than the judicial factor." As to this, I cannot construe it otherwise than as prohibiting obedience, even in England, to the decree of the English Court affirmed by this House; and I think it would be dangerous for your Lordships to appear to give your sanction to this, by leaving that part of the interdict unaltered, temporary though it was. I shall therefore propose to your Lordships to vary it in that respect only.

I have only to add, that the results thus arrived at appear to me to be entirely consistent with your Lordships' judgment on the former appeal, affirming the English decree. At the time when the English decree was made, no suit concerning this trust had been commenced in Scotland; and it was then expressly said that "if there had been any proceedings pending in a Scottish Court, equally beneficial to the infant plaintiff, in which his rights and interests could have been adequately protected, it would have been competent, and probably right, for the High Court in England to stay the further prosecution of that suit, either before or after decree." [His Lordship then read the order given post, p. 551.]

The interlocutor of the Lord Ordinary, having been recalled by the Inner House (which recall will stand), does not require to be dealt with by your Lordships.

I think the costs of the appeal should be paid to all parties out of the trust estate, and that the judicial factor should be directed to pay them.

LORD BLACKBURN:—

The Lord President, in his opinion, says, I think quite truly (1), "It is evident, that if we pronounce judgment in terms of all or any of these conclusions against the defenders, there will arise immediately a conflict of jurisdiction between this Court and the Chancery Division of the High Court of Justice in England. This is a very serious matter."

(1) Ante, p. 473.

H. L. (Sc.)
1885
EWING
v.
ORR EWING.
Lord Blackburn.

Had the interlocutor of the Lord Ordinary not been recalled, this conflict would have been raised in a very painful way, which it would have been difficult to justify:—for if the Chancery Division order the trustees to do anything (it may be to render accounts to that Court) the trustees must obey the order, or incur all the penalties of a contempt of the Court of Chancery Division. And if that interlocutor had not been recalled, they would have incurred all the penalties of a breach of interdict of the Court of Session if they did obey the order of the Court of Chancery. The course taken by the interlocutor now under appeal relieves the trustees from this painful, and in the present case unnecessary, predicament, as they cannot be held responsible for what is done by the judicial factor. I do not, as at present advised, agree in thinking that the declaratory conclusions of the summons are such as to make it correct to decree in their terms; nor that (on the supposition that the sequestration and appointment of a judicial factor were right) it was either necessary or proper to couch the interdicts in the terms in which they are framed; but these are matters that can be amended.

Two important substantial questions remain, (1.) whether the Court of Session had jurisdiction to sequestrate the estate, which lay entirely in Scotland, and appoint a judicial factor. On this I have a distinct opinion that they had such a jurisdiction; and (2.), whether it was a proper exercise of the jurisdiction to exercise it when the only reason for removing the trustees from office, or superseding them for a time, was that, if not so removed or superseded, they would obey the orders of the Chancery Division rather than enter into a personal conflict with that Court. On this I have felt and feel doubt and difficulty.

There are some matters which it is best to notice before entering on the merits. I completely agree that, unless where some legislation (by the independent legislature of Scotland before the Union, or by the legislature of the United Kingdom since) may have made a difference, the judicatures of Scotland and England are as independent of each other as if they were the judicatures of two foreign states. I think the Lord President puts the ground of this rather too low, when he says it is the necessary result of the Treaty of Union. The two kingdoms

were in all respects independent, foreign, and often hostile kingdoms, and there was a mass of border legislation in both countries founded on the supposition that the normal relation of the inhabitants of the countries was that of hostility. Soon after the accession of James I. to the Crown of England this legislation was all repealed (1), and it was established that the normal relation of the inhabitants of the two countries were so far from being hostile, that the post nati were not aliens; but there is no pretence that there was any legislation affecting the independence of the judicature of either country. When the Treaty of Union was agreed on, it would have been competent for the legislature of Scotland to enact, as part of the bargain, that the judicature of Scotland should be subordinate to that of England. I need hardly say that they did not so enact, and, as far as I know, no one has ever suggested that they did so. In the absence of such an enactment the judicature remained independent, as it was before, and though now that England and Scotland have not only a common Sovereign, but also a common legislature, it may not be an accurate use of language to call them foreign countries, and though, no doubt, many enactments have greatly reduced the practical differences between Scotland and England (which is all that I think Sir George Jessel meant to say) I think none of these enactments made the judicature of Scotland dependent on the judicature of England any more than they have made the judicature of England dependent on that of Scotland.

There was a plea added putting a construction on the 19th article of the Treaty of Union, or rather I should say on the Act of Union which incorporates it. It is not made a ground of decision by any Judge, but the Lord Ordinary, Lord Mure, and to some extent Lord Shand, treat it so that it ought to be noticed.

Long before the Union, the Superior Courts of England, when a defendant was properly served with process, entertained an action against him, wherever the cause of action arose: of course, subject to any and every plea to the jurisdiction. The technical rules of English common law pleading required that a venue should be laid to each material allegation; and the very

(1) See 4 Jac. 1, c. 1.

H. L. (Sc.) 1885 EWING v. ORR EWING. Lord Blackburn.

technical way in which this was done is fully explained in the note to *Mostyn* v. *Fabrigas* (1). However, without entering into that, it is certain that when a defendant appeared in the King's Bench, a declaration on a cause of action arising in foreign parts was good, though where for any reason the actual place was material it was necessary to lay a formal venue, and in an action on a deed of covenant, for instance, in case the variance should be fatal on oyer, to say that a bond made at Madras was made at Fort St. George, in the East Indies, to wit, at London, in the ward of Cheap. Is it contended that if two actions had been brought in the Court of King's Bench, the year after the Union, the one on a bond made at Paris, in the kingdom of France, to wit, in London, in the ward of Cheap, and the other on a bond made at Glasgow, in the kingdom of Scotland, to wit, in London, in the ward of Cheap, the first would have remained a good declaration, but the second would have been void, as contrary to the 19th article of the Treaty of Union? Yet, unless we carry the construction of the article so far as to make the entertaining of such an action by the Court of King's Bench a breach of the Treaty of Union, I do not see how the suit entertained by the Chancery Division in this case could be one.

It is extremely improbable that it should have been intended as part of the Treaty of Union to restrict the jurisdiction of the English Courts, and I think the words used cannot bear that construction. There is no authority in either country in favour of such a construction of that article; and there is such a uniform course of precedents in which the English Courts have, since the Union, exercised without objection the same jurisdiction in personam over persons within their jurisdiction that they did before the Union, and have exercised in all transitory actions, though in respect of matters happening in Scotland, and over which the Scotch Courts have concurrent jurisdiction, the same jurisdiction which they exercised and still exercise over cases originally in all other countries out of England, that I do not think that I need do more at present than say that this construction of the article of the treaty is, in my opinion, utterly untenable.

I now come more to the merits. I think that the state of

(1) 1 Sm. L. C. 689.

things was such, before the date of the English writ on the 25th of February, that the appellants held the whole property, wherever situated, as trustees; and no more as executors or administrators than if they had been fresh trustees who had never been executors, to whom the original trustees and executors had assigned the property. And though I think that the judicature of Scotland had jurisdiction over the trustees (if properly brought before them) to make them do their duty as trustees, I do not think they had that jurisdiction either on the ground that the testator whose will created the trust was a domiciled Scotchman, or on the ground that the trust funds were principally originally collected by a Scotch confirmation; still less that they had exclusive jurisdiction. And here I am afraid I do not take the same view as the judges below. I cannot but think that the judges below have put a mistaken construction on what was said in *Preston* v. *Melville* (1), that "the domicil regulates the right of succession, but the *administration* must be in the country in which possession is taken and held, under lawful authority, of the property of the deceased," from not remembering what kind of administration Lord Cottenham was speaking of when he used those words.

There has been a change in the law of England by 20 & 21 Vict. c. 77 (the Probate Act of 1857), as to the Court which is to appoint the personal representative, whether executor or administrator, of deceased persons, and a further change in the special case when the deceased is a domiciled Scotchman, by 21 & 22 Vict. c. 56 (the Probate Act of 1858), but the general law remains as it was at the date of *Preston* v. *Melville* (1).

No person can, according either to the law of England or Scotland, by his will deprive his creditors of the right to enforce payment out of the property he leaves behind him, of such obligations as survive. The personal representative, whether executor or administrator, might without suit safely pay such obligations, unless he had notice of some obligations of a higher degree. In England, at least, there is no distinction between English obligations and foreign obligations. The priority in which they are to be paid does not depend on the nationality of the creditor, but on

(1) March 29, 1841. 8 Cl. & F. 1; 2 Rob. App. 88.

H. L. (Sc.) 1885 EWING v. ORR EWING. Lord Blackburn.

the nature of the debt. The personal representative is liable so far as he has assets to pay. He might defend himself on the ground that he had already fully administered all such assets; but if he had misapplied the assets he might be made liable to make good the deficiency out of his own funds. It would obviously be unjust, as long as there were obligations of any sort for which the personal representative might be made liable out of his own property, on a deficiency of assets to make him hand over the assets to any person who in the due course of administration would come after the holders of these obligations, even though they were those to whom the surplus was, by the testator's will, to come.

The pursuers in *Preston* v. *Melville* (1) were such persons; they were the trustees duly appointed by the Court of Session to act in lieu of those named in the testator's will; they were the partners in Coutts's banking-house, who had been appointed trustees and named as executors by Sir Robert Preston's will, just as the appellants are appointed and named by Mr. Ewing. But the original trustees and executors in that case had, probably very prudently, declined to act.

The law of England, I think, is quite settled that when the personal representative has discharged all that in due course of administration (using the word in its more limited sense) he was bound to discharge, if there is any surplus he ought to deal with it according to whatever may be the directions in the testator's will. If he, without any sufficient reason, refuses to do so, he may be compelled by the Court of Chancery to do so, but he is not required to obtain the sanction of a Court before doing this. It may sometimes be prudent to do so; it would often be vexatious to do so. And it is not necessary that there should be any formal transfer of the property. If Lady Preston, the administratrix with the will annexed, had been satisfied that all Sir Robert's debts were paid, and that the pursuers in that action were the trustees to whom the property by the will was devised in trust, she might have simply assented to their taking it, and that would have vested the property which was in her as administratrix in them as trustees. As to all this, and as to what is

(1) March 29, 1841. 8 Cl. & F. 1; 2 Rob. App. 88.

sufficient evidence of an assent, see 2 Williams on Executors (pt. 3, bk. 3, ch. 4, s. 3).

It might have happened, though in this case it did not, that the testator had, at the time of his death, personal estate in many countries; in, for instance, some one or more of the United States, or in some one or more of the British colonies; in each of those in order to get possession of the estate a personal representative would have had to be appointed. It probably would not have been convenient to make any of the executors themselves such a representative in a distant country; and it certainly would not have been necessary. And it might have happened, though it did not, that his debts would have been so great that his personal estate would have not been sufficient to pay 20s. in the pound. Many difficult questions might, in such a case, especially if the estate was insolvent, have arisen. I do not enter on these questions, for none of those things did happen; and the time when they could have happened was over as soon as the personal representatives were satisfied that all debts and obligations were discharged, and that the administration, in the sense in which Lord Cottenham used the word, was completed, and remitted the foreign funds, if there were any, to the trustees. The trustees would have held them under the same obligation to dispose of them according to the trust, in whatever way those funds came to their hands, if they were received by them rightfully. The domicil of the testator might be all important in ascertaining what the trusts were, but not otherwise.

I cannot, therefore, think that it makes any difference whether the funds came to the hands of the trustees by means of administrators, whether themselves or others, appointed under the Probate Act of 1857 or under the Probate Act of 1858, or (had the fact been so) by means of administrators who collected and remitted the funds from New York, or Calcutta, or Melbourne. I cannot therefore agree with the Lord President and Lord Shand that the Probate Act, 1858, makes any difference in this case, or that it is at all necessary to examine its provisions.

The testator in this case was a Scotchman; the great bulk of his estate was in Scotland, though £25,235 was in England—a sum not by any means despicable, and much more than sufficient

H. L. (Sc.) 1885 EWING v. ORR EWING. Lord Blackburn.

to discharge every liability of the testator's. He named four of his relatives, all Scotchmen like himself, two of whom resided in England and two in Scotland, and one of his partners, and Mr. McGregor, a writer in Glasgow, and "such other person or persons as may hereafter be nominated by me or assumed into the trust hereby created, and the acceptor and acceptor's survivors and survivor of them, the major part of them accepting and surviving and resident in Great Britain from time to time being a quorum," as trustees for the ends and purposes after mentioned. The six named trustees who are the appellants, he named as his executors.

He further "empowered his trustees to appoint any one or more of their own number to be factor or factors under them, or to be law agent or law agents for the trust, and to allow such factor or factors, and such law agent or law agents, their professional charges, and to do everything which, in their discretion, they may conceive to be for the benefit of my estate." When the trustees had got possession of the trust property they proceeded to work the trust in Scotland; nor do I suppose any one can doubt that the testator expected them to act in that way, and I suppose the testator made Mr. McGregor one of his trustees in order that he might be the factor and law agent. At all events the trustees did so work the trust, and no one says it was wrong to do so. But I fail to find anything in the trust deed to require them to do so. There is no provision in the trust, that I find, which must be executed in Scotland. The only qualification on the trustees is that the quorum shall consist of the majority resident in Britain.

If the majority of the trustees at any time came to reside in England, and bonâ fide thought it best for the interest of the estate that the whole funds should be vested in English securities and managed in England, there is nothing expressed in the deed to prevent their doing so. I cannot, notwithstanding what is said by the Lord President, think that there would have been any ground for an interdict to prevent them from doing so. They never proposed to do so, but continued to work the trust in Glasgow.

What they have done appears by the joint minute of admis-

sions. Burnet for the pursuers, and Smith for the defenders, concurred in stating, "That the whole estate of the deceased John Orr Ewing, which was situated in England at the date of his death, amounting to £25,235 12*s.* 6*d.*, had been realized and remitted to Scotland; £22,535 or thereby having been remitted prior to the issuing of the writ in the administration suit on 25th February, 1880, and the balance, being £2700 or thereby, shortly thereafter. They further stated that the defendants, in terms of an order of the Court of Chancery, dated 4th May, 1883, pronounced in the administration suit at the instance of Malcolm Hart Orr Ewing, of which order a copy is hereto annexed, remitted to England, and on 20th June, 1883, paid into the said Court of Chancery the sum of £25,384 2*s.* 11*d.* on account of capital, and a further sum of £8039 2*s.* 11*d.* on account of income, on behalf of the said Malcolm Hart Orr Ewing, in respect of his interest in the estate of the deceased John Orr Ewing, conform to the two official receipts by the Paymaster General, of which copies are also hereto annexed."

No one has ever alleged that the trustees, up to the 25th of February, 1880, had in any way acted, or even given rise to a suspicion, that they meant to act contrary to their duty as trustees. If any one, having a proper interest, had asserted that they had done or left undone something, and properly brought the trustees before the Court of Session, that Court would certainly have had jurisdiction to entertain the action, and give or refuse relief.

In *Brown* v. *Stirling-Maxwell's Trustees* (1), where the question was whether Brown was within a class of servants to whom Sir W. Stirling-Maxwell had left legacies, the pursuer sued in Scotland and got relief, and no one could doubt the jurisdiction of the Court of Session. Had Brown issued a writ in England, and the trustees had appeared to the writ, no one would have doubted the jurisdiction of the English Court to entertain the same question. All that I have before this said as to administering the assets as personal representatives, and working the trust as trustees is only important as leading to this, that in the latter case, at least, the Courts of Scotland and England have concurrent jurisdiction, the

(1) 1883. 10 Court Sess. Cas. 4th Series, 1235.

H. L. (Sc.) 1885 EWING v. ORR EWING. Lord Blackburn.

jurisdiction of the English Court not depending, as the Lord Ordinary seems to think, on the existence of funds in England, but on the trustees being brought in person within the jurisdiction.

The writ in this case was not issued for the purpose of obtaining relief for anything of this sort, but on behalf of an infant by his next friend, in order to have the personal estate of the testator administered, and the trust of his will carried into execution by and under the direction of the Court of Chancery. I do not now repeat anything as to the English law; that has been decided finally by the English Courts, and in this House, in the case of *Ewing* v. *Orr Ewing* (1). But the Lord President shews what I had before only suspected, that such an "administration suit" is not known to the law of Scotland. It may be doubted, if all that is now known had been foreseen, whether the Chief Clerk's certificate would have been reversed by the order of the 21st of March, 1881. I thought that, whilst that order was unreversed, the decisions in the Court of Chancery bound me to say that it was ex debito justitiæ, and not a question of discretion, to grant such an administration. I wished it had been otherwise, and I wish it more now that the admissions shew how very little of the estate (indeed I think at the time when the writ issued no part of the estate) really was in England, and, consequently, how strong a case there would have been for refusing such a grant in this case if it had been a matter of discretion.

The declaratory conclusions of the summons go much further than is required in order to support the sequestration. It is one proposition to say that, owing to the interference of the Court of Chancery, and the refusal of the trustees to enter into a personal conflict with that Court, the trust has become unworkable in the hands of the present trustees, unless they substitute for their discretion that of the Court of Chancery, and that so to do is injurious to the interests of the pursuers, and therefore that the Court of Session may and should change the trustees, and it is quite another to deny that the trustees can under any circumstances act in England, or that an English Court has any jurisdiction at all, even to give relief.

(1) Nov. 30, 1883. 9 App. Cas. 34.

[His Lordship having read the declaratory conclusion of the summons, continued:—]

When the Lord President said: "The plain duty of the defendants would have been to combine the residue of the English with the Scottish part of the estate, and to administer the combined estate in Scotland as a whole, according to the directions of the testator," he had not, I think, any intention to assert that the directions of the testator were to work the trust in Scotland. If he did so mean, I think he made a mistake, for I can find no such directions. If he had said, "to combine the residue of the English with the Scottish part of the estate, and administer the combined estate as a whole according to the directions of the testator, in Scotland, so long as they in their discretion thought it the most convenient place to administer it," I think there would have been no difference of opinion. But I rather think that, from not having before his mind the distinction between administering as an executor and managing as a trustee, or perhaps not taking the same view of that distinction which I do, he did mean that it must be done in Scotland, even though the trustees thought it best and most convenient to put the whole estate into English securities, and substituted new trustees who all were Englishmen.

The declaratory conclusions of the summons would lead to the conclusion, that if an action for relief had been brought in an English Court and the trustees had defended it, but been defeated, and they under the compulsion of that judgment had paid, the trustees had committed a breach of trust, and were liable for it, even though the payment was one which they ought to have made, and which the Court of Session if they had been applied to would have ordered. That could not have been meant. Nor can it have been meant to declare that it was a breach of trust to render accounts to the English Court, even though those accounts went no further than to inform that Court of what they had done in Scotland under the compulsion of the Court of Session.

For these reasons I think that, whatever may be the result as to the substance, the interlocutor appealed against must be varied. But I think the Court of Session had certainly jurisdic-

H. L. (Sc.) 1885 EWING v. ORR EWING. Lord Blackburn.

tion to sequestrate the estate in Scotland and change the trustees, although the effect was to baffle the action of the English Court; for I know of no principle of international law to prevent them from so doing, if the case was one to make it proper so to do. Whether they ought to do so, and whether this House, as a Court of Appeal, should alter what the Court below has done, though within its jurisdiction, on the ground that it was an injudicious use of its jurisdiction, depends on other grounds.

There is very little to be found as to the principles which should regulate the discretion of a Court in changing trustees. The only case which I know on the subject is *Letterstedt* v. *Broers* (1). The conclusion which the Judicial Committee of the Privy Council came to there, on principle (for they could find no authorities), was that the Court must be mainly guided by the welfare of the beneficiaries, and that "if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate" (2). On that principle I think that if the proportions of the Scottish funds to the English had been reversed, and the funds in England had been £400,000 to £20,000 in Scotland, it would not have been a proper exercise of the jurisdiction to remove the trustees.

I doubt a little whether the judges below directed their minds sufficiently to the question whether in this particular case it might not have been better for the interests of all to allow the administration suit to go on, but I am inclined to think on the whole, that with the undertaking which was given by the appellants' counsel it may be better to allow the removal.

I agree in the proposed form of order.

LORD WATSON:—

In regard to some of the points raised upon this appeal, I have never entertained any serious doubt; but there are questions involved in it upon which I have felt much difficulty in forming

(1) March 22, 1884. 9 App. Cas. 371, at p. 385.

(2) March 22, 1884. 9 App. Cas. at p. 386.

an opinion satisfactory to my own mind. That difficulty has been owing, in some measure, to the circumstance that the record appears to have been framed with a view to the leading conclusions of the summons for declarator and interdict, irrespective of the alternative conclusions to which effect has been given by the interlocutor of the First Division.

It is unnecessary for me to refer to the circumstances in which this litigation had its origin, seeing that these have already been fully stated in the judgment delivered by my noble and learned friend Lord Blackburn. I shall content myself with saying that, in my opinion, the trust created by the mortis causâ disposition and settlement of the late Mr. John Orr Ewing is a Scotch trust, and that, primâ facie, his trustees are amenable in all questions touching the administration of the trust estate to the jurisdiction of the Courts of Scotland. The truster appears to me to have contemplated that his estate should be administered in Scotland; he expressly declares that the trustees are to have the powers, privileges, and immunities conferred upon trustees by any Act of Parliament applicable to Scotland, and he authorizes the recording of his settlement as a Scotch deed. In the case of a foreign trust—foreign in the same sense in which I have ventured to designate the late Mr. Orr Ewing's trust as Scotch—the Court of Session would decline, even if the trust included landed estate in Scotland, to repair any lapse of administration occasioned by the failure or death of the trustees (vide *Brockie and Another* (1)).

I do not, of course, intend to suggest that domiciled Scotchmen, acting in the execution of a Scotch trust, when temporarily resident in a foreign country, may not, by reason of their personal presence, be subjected, quâ trustees, to the jurisdiction of the tribunals of that country. And I think it may be safely asserted that in some cases it would be the plain duty of the Courts of Scotland to recognise and give effect to these foreign proceedings; and that in other cases, it might be their duty, as well as their right, to disregard them. If a foreign creditor, in such circumstances, obtained a regular judgment, by process in his own Courts, against Scotch trustees, for a debt incurred to him by the truster, I do not think the Court of Session could or would

(1) July 10, 1875. 2 Court Sess. Cas. 4th Series, 923, at p. 924.

H. L. (Sc.) 1885 EWING v. ORR EWING. Lord Watson.

examine the merits of that judgment, or refuse to enforce it. On the other hand, if a single Scotch beneficiary followed the trustees abroad, and, during their temporary residence there, sued them and obtained decree against them for his share of the trust estate, I do not think that the Courts of Scotland, in any judicial distribution of the estate, would be precluded by that decree from considering and determining, according to the principles of Scotch law, the amount of the share to which each of the beneficiaries, including the holder of the decree, was entitled.

In the present case, it is maintained for the infant Malcolm Hart Orr Ewing and his next friend, George Wellesley Hope, using the name of the late Mr. Orr Ewing's trustees, that the First Division of the Court of Session had no jurisdiction to sequestrate the trust estate and appoint a judicial factor, in respect of the proceedings, then pending at their instance before the High Court of Chancery in England. The power of the First Division to make the appointment contained in their interlocutor of the 29th of February, 1884, was not, in my opinion, ousted by these proceedings. That is really the operative part of the judgment of the Inner House; but it also contains a finding and decerniture in terms of the declaratory conclusions, although it does not give effect to the conclusion for interdict which was affirmed by the Lord Ordinary. I have come, without much difficulty, to the conclusion that the declaratory decree cannot be sustained upon the reasons which have been assigned by the learned judges in the Courts below; and I entertain serious doubts whether it would, in any circumstances, be either necessary or expedient to pronounce such a decree. I am at present disposed to think that, whenever a real conflict of jurisdiction does arise between two independent tribunals, the better course for each to pursue is to exercise its own jurisdiction so far as it availably can, and not to issue judgments proclaiming the incompetency of its rival.

The 19th Article of the Treaty of Union which is referred to in the opinions of the learned judges, appears to me to have a very remote bearing upon the points raised in this appeal. It does establish, what has not been controverted in the argument addressed to your Lordships, that the Court of Session is an

independent national tribunal, as independent and of as high authority, within Scottish territory, as the Court of Chancery within the realm of England. I agree with Lord Deas that "the judicatories of Scotland and of England are as independent of each other, in their respective territories, as if they were the judicatories of two foreign states" (1). In *Maclachlan* v. *Meiklam and Others* (2), which is referred to in the opinion of the Lord President, the Treaty of Union had a very direct bearing upon the question before the Court, because, in that case, the Master of the Rolls had ordered Scotch trustees to deposit in the Record and Will Office, certain title-deeds which were on the register in Scotland, whereas the 24th Article of the Treaty expressly declares that, notwithstanding the Union, all records, rolls, and registers whatever, public and private, shall "continue to be kept as they are within that part of the United Kingdom now called Scotland, and that they shall so remain in all time coming." In this case, the terms of the Treaty of Union appear to me to throw very little light upon the questions which the House has to decide.

In deference to the favour with which it was received by the learned judges in both Courts, I have very carefully considered the argument which was pressed upon us for the respondents, founded upon 21 & 22 Vict. c. 56, which now regulates confirmations in Scotland; but I am unable to assent to it. The provisions of that Act do not appear to me to deal, directly or indirectly, with the subject of jurisdiction, or to indicate that the legislature either intended to confer upon the Courts of Scotland any new jurisdiction, or to abridge any jurisdiction which, before it passed, might have been lawfully exercised by the Courts of England and Ireland. It is thereby enacted that the inventory lodged with a petition for confirmation in Scotland may, when the deceased had his principal domicil there, include his personal estate in England and Ireland; and that, instead of taking out letters of administration in these countries, the executor nominate may obtain a good title to such personal estate by having his testament-testamentar duly sealed in the Courts of Probate in London and Dublin. But the effect of that proceeding,

(1) Ante, p. 482. (2) July 9, 1857. 19 Court Sess. Cas. 2nd Series, 960.

H. L. (Sc.) 1885 EWING v. ORR EWING. Lord Watson.

as declared by 21 & 22 Vict. c. 56, s. 13 and 14, is that the Scotch confirmation, when sealed, shall have the like force and effect, in England and Ireland, as if letters of administration had been granted by their respective Courts of Probate. Then according to the statutory form of a Scotch decree (21 & 22 Vict. c. 56, Schedules D and E), confirmation to the office is granted, subject to the *proviso* that the executor shall render just count and reckoning, for his intromissions with the deceased's estate, not in the Courts of Scotland, but "when and where the same shall be lawfully required." I venture to think that the jurisdiction of the Scotch Courts, whether it be exclusive or not, in regard to the administration of the moveable estate of persons dying domiciled in Scotland, and there confirmed to, depends upon general principles of jurisprudence, as accepted in the law of Scotland, and not upon the provisions of 21 & 22 Vict. c. 56, or of any other statute.

I am, moreover, of opinion that the gentlemen, who at the commencement of this litigation, were executing the trusts of Mr. Orr Ewing's settlement, must be regarded, not as executors, but as trustees. The deceased conveyed to them, in their capacity of trustees, the *universitas* of his estates, heritable and moveable; and his intention must have been that, after his moveable estate was ingathered, and his debts paid, the whole should be administered as one trust, and not that they should be trustees quoad his heritable, and executors quoad his moveable, estate. No doubt, after conveying all his estate to his trustees, he appoints them to be his executors; but that is merely an ancillary appointment, made with the view of giving them an active title to recover, if necessary, his moveable estate in order to its being administered by them as his trustees. It would have been in entire accordance with the just construction of his disposition and deed of settlement, had one of the trustees nominated been confirmed as executor, and, after paying debts, transferred the free executory funds to the whole body of trustees, to be disposed of by them in conformity with the purposes of the trust. In the case of testate succession, confirmation was never required by the law of Scotland, in order to take moveable estate out of the heriditas jacens of the deceased. By that law, the title of a

testamentary executor to personalty of which he has obtained possession is complete, without confirmation, which is, however, necessary in order to give him an active title against debtors to the estate who decline to pay without it. The provisions of 21 & 22 Vict. c. 56, and of previous statutes regulating confirmation, in so far as these require that the inventory shall include the whole personal estate of the defunct, were enacted for fiscal purposes, and not for the purpose of vesting the executor with those assets to which he might have a perfect title independently of his confirmation.

That the Courts of Scotland will, in certain circumstances, sustain their own jurisdiction over the trustees of a foreign will who are resident in Scotland, is a proposition which does not appear to me to admit of dispute. In *Ferguson and Others* v. *Douglas, Heron, & Co.* (1), Lord Loughborough said that he had "no doubt as to the competency of the Court of Session, in a case where either the persons of executors or effects of the deceased are within their jurisdiction." That was an action brought for recovery of debt by a banking firm in Scotland, and I cannot suppose that Lord Loughborough meant to lay down the law (for the point was not before him) to the effect that the Courts of Scotland either did exercise, or were bound to exercise, jurisdiction over foreign trustees in every case in which the persons of trustees or funds of the trust were to be found in Scotland. The principles which regulate the exercise or non-exercise of jurisdiction in such cases have now been settled by a long course of decisions. These decisions establish a broad distinction between claims of debt at the instance of Scotch creditors and claims by persons beneficially interested in the estate, which involve questions as to the due execution of their office by the trustees, or as to the rights and interests of other beneficiaries. Thus, in *Campbell* v. *Rucker* (2) an action, proceeding on arrestment jurisdictionis fundandæ causâ, was sustained at the instance of a Scotch creditor, against the executor of a West Indian will, who had obtained letters of administration from the Prerogative

(1) Nov. 11, 1796. 3 Pat. App. 503, at p. 510; in Court Sess. Nov. 19, 1793; 11 Fac. Col. 157.

(2) March 2, 1809. Hume's Dec. 258.

H. L. (Sc.) 1885 EWING v. ORR EWING. Lord Watson.

Court of Canterbury. The Lord Ordinary repelled a preliminary defence of no jurisdiction, "in respect the present action is not brought for the purpose of bringing an English creditor to a general accounting, but that of operating payment of a particular debt out of a fund belonging to the defunct, and attached by arrestment in Scotland for that purpose," and the Court adhered. But in *Brown's Trustees* v. *Palmer* (1), a case similar in all respects to the preceding, with this single exception, that the summons was not at the instance of a creditor of the defunct, and concluded for an account of the executor's intromissions, and payment of the balance to the pursuers, the Second Division, affirming the judgment of the Lord Ordinary, dismissed the action. A like decision was given in the case of *Macmaster* v. *Macmaster* (2).

The reason assigned by the Scotch Courts for declining to entertain actions against foreign trustees or executors when they come to Scotland, or when trust or executory estate is under arrestment there, is not that the Court of Session is an incompetent, but an inconvenient forum. It necessarily follows that the plea of forum non conveniens must fail, in cases when the trustees are not liable to suit, or are evading an accounting in the proper forum of the trust, which the law of Scotland regards as the only convenient forum, so long as the pursuer can there obtain the redress which he seeks. In *Macmaster* v. *Macmaster* the Lord Justice Clerk Boyle said (3): "The decisions go to this, that if the executor of a foreign will come here he may be called before this Court, *because he could not in the foreign country.*" And the Lord President Inglis in *Clements* v. *Macaulay* (4), which was a case of partnership accounting, observed that "the cases in which the plea of inconvenient forum has been sustained are chiefly of two classes: 1st, where foreign executors have been sought to be called to account in this country for the foreign executory estate situated in another country. In these cases the question always was, whether it was more for the true and legitimate interest of the executory estate, and all the

(1) Dec. 17, 1830. 9 Court Sess. Cas. 1st Series, 224.

(2) June 7, 1833. 11 Court Sess. Cas. 1st Series, 685.

(3) June 7, 1833. 11 Court Sess. Cas. 1st Series, at p. 688.

(4) March 16, 1866. 4 Court Sess. Cas. 3rd Series, at p. 592.

claimants, that the distribution should take place where the executors have had administration. There is, of course, in most cases, a strong presumption in favour of that consideration, and accordingly the plea is generally sustained in such cases." I have no fault to find with the explanation thus given by the present head of the Court of the rationes by which the forum, in which administration has taken place, has also been held by Scotch Courts to be the one convenient forum, to the exclusion of their own jurisdiction. But it is equally accurate to say that the only reason which has induced the Courts in Scotland in such cases to uphold their own jurisdiction has been, as stated by Lord Justice Clerk Boyle (1), because the trustee or executor could not be called to account in the more convenient forum.

I am not aware of any authority in the law of Scotland for entertaining an action in the Court of Session against foreign trustees who can be called to account, and who are willing to account in the proper forum, though action has been sustained in cases where they were neither liable nor willing to answer in that forum. There is another and intermediate class of cases, in which it is doubtful whether the Courts of the forum conveniens may have it within their power to give the pursuer a full remedy, or to enforce their orders against the persons of the trustees and the trust estate. In such cases, the Court of Session will not dismiss the suit, but will sist procedure, not with the view of superseding, but of aiding the action and supplementing the powers of the foreign Court, in order that full justice may be done.

The case of *Peters* v. *Martin* (2) illustrates the grounds upon which the Court of Session has, notwithstanding the plea of inconvenient forum, sustained its own jurisdiction against the trustee of a foreign will. Martin, the defender, was sole trustee under an English will, the estate being partly situated in England and partly in the colonies. He had taken out letters of administration in England, but, at the time when the action was raised, he had returned to and was resident in Scotland, his native

(1) In *Macmaster* v. *Macmaster*, June 7, 1833. 11 Court Sess. Cas. 1st Series, at p. 688.

(2) June 21, 1825. 4 Court Sess. Cas. 1st Series, 107 (2nd ed.), p. 103.

H. L. (Sc.) 1885 EWING v. ORR EWING. Lord Watson.

country. The action was at the instance of the trust beneficiaries, and concluded for implement of the will, and for investment in terms of the trust of a balance of £7500, which it was alleged he had wrongfully retained in his hands. The pursuers averred that they were unable to institute proceedings against him in England so long as he was resident in Scotland. Martin objected to the jurisdiction of the Court of Session, but the Lord Ordinary sustained the action. The Second Division, however, recalled his Lordship's interlocutor, and superseded the cause, in consequence of an allegation by Martin that he was willing to submit to the jurisdiction of the Court of Chancery, and that he had actually filed a bill in that Court. It subsequently appeared that his allegation was untrue, and that no effectual proceedings had yet been taken by him in Chancery; and accordingly the Second Division allowed the action to proceed, reserving to him to be heard upon his allegation that he had put himself within the jurisdiction of the Court of Chancery. The report does not give the opinions of the judges; but the ground of the decision was thus explained by the Lord Justice Clerk (one of the judges who took part in it) in the subsequent case of *Macmaster* v. *Macmaster* (1): "In the case of Peters, the executor was here, and refused to appear in Chancery." To my mind it is obvious that, if Martin had actually done that which he merely professed his willingness to do, and had submitted himself to the jurisdiction of the English Court of Chancery in respect of the matters embraced in the Scotch action, the Second Division would not have sustained it.

Macmaster v. *Stewart* (2) furnishes an illustration of that class of cases in which the Court, whilst refusing to dismiss the action, yet stay all procedure in it unless and until it has been ascertained that the pursuers cannot obtain an effective remedy against the trustees in the proper forum of the trust administration. In that case Mrs. Stewart, a domiciled Scotchwoman, one of the residuary legatees under an English will, upon the refusal of the trustees to accept or act, took out letters of administration

(1) The Lord Justice Clerk, Boyle, June 7, 1833. 11 Court Sess. Cas. 1st Series, at p. 688.

(2) June 17, 1834. 12 Court Sess. Cas. 1st Series, 731, at p. 732.

in England, and intromitted with the whole estate falling under the will consisting of real as well as moveable estate in England. The testator had by his will directed that if any of his legatees harassed the executors, the latter should file a bill in the High Court of Chancery, so that his will might be carried into execution under the direction of that Court. All debts and special legacies had been paid shortly after the death of the testator, which occurred in the year 1810; but there had been an undue delay in realizing and dividing the residue; and, in the year 1832, an action was raised against Mrs. Stewart, in the Court of Session, by two of the residuary legatees, concluding for implement of the trusts of the will. The pursuers averred their inability to bring Mrs. Stewart to an accounting before the Court of Chancery because she lived beyond its jurisdiction, and had removed great part of the proceeds of the trust estate to Scotland. The Lord Ordinary (Corehouse) sisted process for fourteen days, in order that the defenders (Mrs. Stewart and her husband) might have an opportunity of filing a bill, or adopting other proceedings for making themselves accountable in the Court of Chancery. Availing themselves of the opportunity thus afforded them, the defenders did file a bill in the Court of Chancery; but the pursuers still insisted on their right to proceed with the Scotch action, alleging that the defenders could at any time abandon the proceedings instituted by them in England, and so evade a complete accounting. The Lord Ordinary thereupon directed a case and queries to be laid before English counsel, and being satisfied, by the answers of counsel, that the defenders could not defeat the English proceedings by withdrawing or abandoning the bill which they had filed, his Lordship "sisted farther procedure, in hoc statu." In a note to his interlocutor his Lordship said: "On the grounds, therefore, both of expediency and the will of the testator, formerly referred to, it seems imperative that this process should be sisted until the accounting in Chancery is brought to a close. It is possible that the aid of this Court may be afterwards required to enforce the execution of the decree." On a reclaiming note to the First Division, their Lordships adhered to the interlocutor of the Lord Ordinary. The Lord President Hope said: "If any improper delay is allowed by the

H. L. (Sc.) 1885 EWING v. ORR EWING. Lord Watson.

defenders to occur in their accounting in England, it is open to the pursuers to go to the Lord Ordinary, and crave his Lordship to proceed here." To the same effect Lord Mackenzie observed, "It may happen that circumstances occur before that period (i.e., the close of the accounting in England) which will make it necessary to go on with the accounting here." These observations appear to me to refer to the possibility of the defender, Mrs. Stewart (who, to say the least, had been very remiss in the performance of her duties as a trustee, and had not displayed much anxiety to render an account of her intromissions), evading the jurisdiction or disobeying the orders of the High Court of Chancery. The purpose of the learned judges in making these observations, was to make it clear that, in the event of any such circumstances occurring, the pursuers were not to be precluded from moving the Scotch Court by the terms of the Lord Ordinary's note.

I think it is worthy of observation that, as shewn by the authorities to which I have already referred, the Courts of Scotland, in declining jurisdiction over foreign trustees, do not rely upon the circumstances of there being no pending litigation in the proper forum. Although there be no lis alibi pendens, it is sufficient to oust their jurisdiction, on the plea of forum non conveniens, either that the pursuer can obtain his remedy by a suit in the proper forum, or that the trustee, called as a defender, expresses his willingness to institute, and accordingly does institute proceedings in that forum, by means of which the pursuer can have the redress which he claims. There were no proceedings depending in the foreign forum, when action was raised before the Court of Session in *Campbell* v. *Rucker* (1), *Macmaster* v. *Macmaster* (2), or in *Macmaster* v. *Stewart* (3). In *Peters* v. *Martin* (4) it was alleged by the defender that an effective proceeding, at his instance, was depending before the Court of Chancery; but, after an opportunity was allowed him of substantiating his allegation, their Lordships of the Second Division were satisfied that the

(1) 1809. Hume's Dec. 258.

(2) June 7, 1833. 11 Court Sess. Cas. 1st Series, 685.

(3) June 17, 1834. 12 Court Sess. Cas. 1st Series, p. 731.

(4) June 21, 1825. 4 Court Sess. Cas. 1st Series (2nd ed.), p. 108.

statement was untrue; and they permitted the action to proceed on the ground that the defender refused to submit himself to the jurisdiction of the English Court.

There are two decisions, which have been cited as shewing that the Scotch Courts have gone further, in sustaining their jurisdiction over English executors, than the principles which I have stated would justify. I refer to *Morison* v. *Ker* (1) and *Scott* v. *Elliot* (2). But it has been repeatedly explained that, in neither of these cases was it sought to call an administrator to account for his intromissions with the trust or executory estate; and that explanation is, in my opinion, correct.

In *Morison* v. *Ker* (1), the deceased, Alexander Ker, who was resident in England, left a will by which he bequeathed the life rent of his estate, which consisted of personalty, to his sister Janet, and the fee, on her death, to "his next lawful heir or heiress of blood." The life-rentrix, who was a domiciled Scotchwoman, took out letters of administration in the Prerogative Court of Canterbury, in virtue of which she uplifted the estate and transferred it to Scotland. Before her death, she delivered the whole estate to James Ker, a domiciled Scotchman, believing that on her death he was entitled to it, as next lawful heir of blood of the deceased. After her death an action was brought against James Ker, by several persons resident in Scotland, who claimed a share of the estate as being, along with the defender, the next of kin of the deceased. It was pleaded for the defender that, as an English executor, he was only liable to answer in the Courts of England, and that the action ought to be dismissed; but the Court repelled the plea. The defender was not, in point of fact, an executor, and the title by which he held the deceased's estate was not derived from any English Court. He was in reality defending his own right as sole beneficiary, against pursuers who alleged that they were also beneficiaries, and that payment had been made to him under error by the executor, then deceased.

Then, in *Scott* v. *Elliot* (2), the defender, Maria Elliott, who had always lived in Scotland, administered to the personal estate

(1) Feb. 25, 1790. Mor. Dict. 4601; 10 Fac. Col. 233.

(2) Dec. 9, 1797. Mor. Dic. 4845; 12 Fac. Col. 115.

H. L. (Sc.)
1885
EWING
v.
OKR EWING.
Lord Watson.

of her father in England, where he was resident at the time of his death, not under any settlement, but as the hæres in mobilibus of the deceased. The defender's mother had obtained a decree of the Commissaries divorcing her from the deceased, and decerning him to pay to her an annual sum for the aliment of the defender; and the action was brought against the defender, as her father's representative, for payment of arrears due under that decree. The defender did not allege that the succession which she took from her father was insufficient for payment of his debts, but she contended that "from his long residence in England, every claim against him, and consequently against his representative, ought to be decided by its laws." That contention was plainly untenable as a plea ousting the jurisdiction of the Court. The claim made was for a debt due under a Scotch decree, and it involved no question either as to the due administration of the executory estate of the deceased, or as to the rights of parties having beneficial interests.

If I have rightly stated the principles upon which the Courts of Scotland exercise or decline jurisdiction over foreign trustees, it appears to me to be a necessary consequence that the Courts below have erred in giving decree in terms of the declaratory conclusions of the summons; because these conclusions affirm the absolute incompetency of the High Court of Chancery to entertain the suit which was brought before it. There is, to my mind, a broad distinction between a radical defect of jurisdiction, and jurisdiction to entertain, stay, or dismiss a suit, according to the discretion of the Court. The latter is the kind of jurisdiction exercised by the Scotch Courts in the case of foreign trustees; and they are, in my opinion, bound, ex comitate, to allow a similar jurisdiction to foreign Courts, in the case of Scotch trustees. How far the Courts of Scotland are entitled or bound to criticise and control the discretion of a foreign Court in sustaining its own jurisdiction, when that discretion has been honestly exercised, it is not necessary for the purposes of this appeal to consider; and it is not, in my opinion, expedient to determine such nice questions, until they actually arise for decision.

With reference to the English administration suit, at the instance of the parties who are now prosecuting this appeal, I

desire to make these observations. It is true that, in the law of Scotland, there is no form of process which is known by the name of an administration suit; and also that the Scotch Courts do not undertake to superintend generally the administration of trusts, and do not interfere with the management of the trustees appointed by a testator, unless a relevant case is stated which calls for their interference. But the Courts are at all times ready to entertain a complaint at the instance of a beneficiary, if made in proper form, to the effect that the trustees are mismanaging or dilapidating the trust estate, or that they have failed or unduly delayed to pay, or to set aside and secure, the provisions made in his favour by the settlement of the truster, and to give him such remedy as may seem just. And I entertain no doubt that the allegations made by the compearing appellants in their Chancery proceedings would have been relevant to sustain an action of count and reckoning in the Court of Session, at their instance, against the nominal appellants, with appropriate conclusions for having their share of the late Mr. Orr Ewing's estate either paid to them or set apart and secured for future payment. And it does not appear to me to admit of any doubt that, if the circumstances of this case had been reversed, if the trust of the late Mr. Orr Ewing had been English in the same sense in which I have described it as Scotch, the Court of Session would have been bound, by its own decisions, at once to dismiss any such action brought before them by a beneficiary, whether in minority or of full age, and to leave the pursuer to seek his remedy in the Courts of England, as the proper forum of the trust administration. It may be said that the determination of what shall constitute a forum conveniens or non conveniens is more or less a matter of discretion, but the principles upon which it has hitherto been held, in cases of this kind, that the Court of Session was forum inconveniens, are, in my opinion, as binding upon its judges as any rules of positive law.

I further desire to say that, in the English appeal of *Ewing* v. *Orr Ewing* (1) in this House, I did not think I was at liberty to consider the question arising for decision as an open question.

(1) Nov. 30, 1883. 9 App. Cas. 34.

H. L. (Sc.) 1885 EWING v. ORR EWING. Lord Watson.

It appeared to me that to disregard to any extent the long and consistent series of authorities by which the order appealed from was supported, would in effect have been to trench upon the functions of the legislature. I participated very strongly in the doubt expressed by my noble and learned friend, Lord Blackburn, "Whether it is always for the benefit of all concerned to make such an order," but, at the same time, I agreed with his Lordship that it had "been too long the course of Chancery to treat this as a right which the plaintiff has ex debito justitiæ." In my opinion, the true principle upon which jurisdiction in such cases should depend is, that every person beneficially interested ought to seek his remedy in that Court in which it is most for the benefit of the trust and of all concerned that the litigation should be carried on; and it does appear to me that our decision in *Ewing* v. *Orr Ewing* (1) will occasionally lead to a violation of that principle.

As I have already indicated, I do not think the declaratory conclusions of the summons in this case can be sustained. On the other hand, I am of opinion that the jurisdiction of the Court of Session to sequestrate the trust and appoint a judicial factor cannot be held to have been ousted by the proceedings in Chancery; and, although I did at one time entertain doubts upon the subject, I am of opinion that the appointment ought to be sustained. I am also of opinion that the First Division had power to grant, and rightly granted, the limited interdict contained in their interlocutor of the 29th of February, 1884, with the exception of that part of it which relates to accounting; that interdict being in other respects in common form, and its sole object and effect being to enforce the sequestration and secure the immediate transfer of the whole trust estate then in Scotland to their own judicial officer.

LORD FITZGERALD:—

The lucid and dispassionate judgment of the noble and learned Earl meets with my entire concurrence. That judgment, and the judgments of the noble Lords who have preceded me, have so

(1) Nov. 30. 1883. 9 App. Cas. 34.

exhausted the facts and the authorities that I can add but little and will endeavour to avoid repetition of that which has been already said so well.

The Lord President, in expressing his judicial opinion, which is the foundation of the interlocutor of the Inner House, says that "the action is brought under very exceptional circumstances, and the conclusions of the summons raise questions of great public interest." I agree in this, and will add for myself that the questions thus raised require the calmest judicial consideration divested of even the least shade of bias or susceptibility. If my mind could possibly be affected by any inclination it would be in favour of the respondents.

The main question before your Lordships' House, is whether so much of the interlocutor of the Inner House as "finds and declares and decrees in terms of the declaratory conclusions of the summons" is well founded in law? Those declaratory conclusions may be said to be the first three, which assert in substance and effect that by virtue of "the trust disposition," and according to the law of Scotland, the trustees are bound to carry out the purposes of the trust in Scotland, and under the authority and subject to the jurisdiction of the Scottish Courts *alone*, and are not bound to render any accounts of the estate to the High Court of Justice in England, "or to any other foreign tribunal furth of Scotland." I interpret "foreign" and "furth," as meaning "outside the limits of Scotland," and not intended to convey that England is as to Scotland a foreign country, just as China or Japan would be, or her tribunals alien tribunals.

My Lords, I am clearly of opinion that in decerning these declaratory conclusions the judgment of the Inner House was erroneous. No rule of Scottish law justifies the decerniture of those conclusions.

It seems to me that the interlocutor appealed from is so far in conflict with the decision of this House in the former appeal in the English action. Your Lordships were not then "administering a law different from or antagonistic to the principles of the law of Scotland," or giving effect merely to the rules and precedents of the English Court of Chancery. Your Lordships, in that case determined a question then arising as to the jurisdiction

H. L. (Sc.) 1885 EWING v. ORR EWING. Lord FitzGerald.

of the latter Court in the sense of its inherent legal authority and the extent of its power.

If the question of the jurisdiction of the Court of Chancery in the English cause was now open to us on this appeal, if it could be called in question, I could have no hesitation in determining in favour of that jurisdiction to the full extent to which it had been exercised. The Court of Chancery was there acting in personam at suit of a competent plaintiff against trustees resident within the locality in which its authority was to be exercised, and their co-trustees, who, on notice, intervened and submitted to the jurisdiction.

My Lords, in coming to this conclusion, I rest nothing on the circumstance of a portion of the personalty having been, at the time of the testator's death, locally situate in England, or of there being English administration to that part of the estate, or of the authority of the trustees to invest the trust funds, if they should think fit, in English securities; and, on the other hand, it seems to me that the nationality of the trustees does not affect the question.

It is worthy of observation that the Scotch conveyancer who prepared the trust disposition lays no stress on residence as a qualification of the trustees, save in one instance, where it is provided that "the major number of them accepting and surviving, and resident *in Great Britain,* from time to time, being a quorum, as trustees and trustee for the ends, uses, and purposes after mentioned, the said trustees and their foresaids, and their quorum, being hereafter referred to as 'my trustees.'" The truster then, after a gift of his whole estate, heritable and moveable, to his trustees, appoints them also his executors, with a direction for the payment of his debts, sick bed and funeral expenses; and thereafter through the numerous directions of the trust disposition the appellation "executors" is dropped, and each further provision commences thus:—"I direct my trustees." The line of distinction between their acts as executors and their duties as trustees is thus sharply defined.

It is also observable, if it be a matter of importance, that the truster does not, in the "trust disposition," give any express direction that the trust should be carried out in Scotland, nor is

such "his expressed desire," although I think he may have so intended, for reasons which I will presently point out. The truster declares his intention of purchasing a landed estate, and that if he dies possessed of it, his wife shall have certain rights in the mansion-house, gardens, &c., but he does not indicate in any way that the estate is to be in Scotland, and it is obvious that, according to the express trusts of the deed, the whole or a large portion of the trust fund might have been and still may be invested in land or other securities in any part of the United Kingdom at the discretion of the trustees.

But although the truster's express declaration (if there had been such declaration) that the trust disposition should be carried out in Scotland and under the supervision and direction of the Scottish Courts, could not affect the question of jurisdiction, yet it may form an important element to guide the exercise of judicial discretion. It seems to me that, though the truster has not so expressed it, yet he did expect that the trusts of his disposition would be carried out in Scotland, and with the supervision and aid, if necessary, of the Scotch Courts acting in the administration of Scotch law, and according to their well-known and established practice. The greater part—say five-sixths—of the trust estate consisted of the truster's share and interest in the firm of John Orr Ewing & Co., in which he was a partner. The truster gives special directions as to how his share of the capital of that firm is to be withdrawn. The second codicil is applicable to a portion of the same capital to the extent of £100,000, and the assumption of two of his nephews, being also two of the residuary legatees, as partners of that firm, and it seems reasonable to assume that the truster had in view that the trusts of this portion of the trust fund should be carried into operation in Scotland by the trustees he had selected, and, according to Scotch practice, extra curiam. The whole instrument, too, it is obvious, is one couched all throughout in the language of Scotch conveyancing, and must be interpreted according to Scotch law. If difficult questions should arise as to the rights of the legatees, and it would be too sanguine to anticipate that such difficulties may not arise, such questions must be decided according to the law of Scotland.

H. L. (Sc.) 1885 EWING v. ORR EWING. Lord FitzGerald.

There is a passage of the trust disposition (at page 10 of the printed case) which somewhat illustrates the view I have expressed, and is as follows: "And I do hereby nominate and appoint my trustees to be tutors and curators, or tutor and curator, to all persons taking benefit under these presents who may be in pupillarity or minority, and who may not have any tutors or curators, quoad such benefit during their respective pupillarities and minorities, and without prejudice to the powers, privileges, and annuities conferred upon trustees by *any Act of Parliament applicable to Scotland*, or to which trustees may be entitled at common law; all of which, in so far as not inconsistent herewith, are hereby conferred upon the said trustees, executors, tutors, and curators. I hereby authorise my trustees, if they think fit, to wind up or carry on, or concur in winding-up or carrying on any business or adventure in which I may be engaged at my death either by myself or in company with others, and to make such arrangements and settlements in connection therewith as they may think proper, to allow any share or interest which I may have in any business in which I may be concerned along with others to remain in the hand of my surviving partners or partner, for such period and on such terms, with or without security, as they may in their discretion deem advisable, and that, notwithstanding the terms of any contract of co-partnership which may then be existing."

It will be observed that the truster here avails himself of the practice under the law of Scotland which enables the donor to appoint tutors and curators of his gift during the pupillarity and minority of the beneficiary, at the same time preserving for them or conferring on them the protection of "any Act of Parliament applicable to Scotland," and he also authorises his trustees to carry on any business or adventure in which he may be engaged. He does not appear to have been engaged in any business save in Scotland.

I cannot help regretting that the certificate of the Chief Clerk in the English action was disturbed. He certified on the 18th of February, 1881, "This action has not been properly instituted, and it is not fit and proper, or for the benefit of the infant plaintiff, that the same should be further prosecuted." That

certificate was discharged by the Master of the Rolls, on the ground that he considered that the action was for the benefit of the infant; but if it had been open to him as a matter of judicial discretion, it would seem to me to have been more expedient to have let that action stand dismissed, although it would still have been open to the father of the infant if he thought fit, or to the mother, acting through a next friend, to have instituted another and properly constituted suit for the protection of the interests of the infant, but subject to the consideration of "forum non conveniens."

It seems to me to be undesirable to canvass the merits or defects of the diverging lines of procedure in the respective courts of the two countries, or to consider whether either is "fortunate," the one in the possession of the privilege of an "administration suit," or the other, the absence of that blessing, or whether the statement of the Lord President (1) has not disclosed an infirmity in Scotch practice in not providing any adequate means for the protection of beneficiaries, such as the residuary legatees in the present case. An action of multiple or double poinding would not seem to me to be sufficient or applicable. On the question of comparative expense I can form no opinion. It may be that "the Chancery Division" viewed from a distance, and through an exaggerated medium, carries with it no small degree of apprehension both as to the duration and the cost of its procedure; but on the other hand we have no information as to the fees or commission or percentage of the judicial factor, or whether payable on the whole fund, or on its income only, or on both, or of the probable expenses or costs of the several actions or proceedings which may from time to time be necessary in carrying into effect trusts which must extend over a long period of time before the day of final exoneration shall have been reached.

I concur in the opinions expressed that the Courts of Scotland are as entirely independent of the High Court of Justice in England as the latter Court is independent of the Courts in Scotland. The judicatories of the two countries are as independent of each other as they were before the Act of Union, and

(1) *Ante*, p. 472.

H. L. (Sc.) 1885 EWING v. ORR EWING. Lord FitzGerald.

there is nothing in that Act or in the Imperial Statutes since to militate against that independence, although there has been some wholesome legislation which tends to make each to be ancillary to the other in the due administration of justice in cases coming within their proper jurisdictions. I do not find it necessary to go further, or to adopt the opinion of Lord Campbell that the two countries are, for the purposes of judicial jurisdiction, "to be considered as independent foreign countries unconnected with each other," or "as if they were the judicatories of two foreign States." That proposition seems to me to be unnecessary for the decision of the present case, and was not necessary for the decision of the Marquis of Bute's case, and is so extensive as probably to involve consequences not now quite foreseen.

Thus, for instance, the Lord Ordinary, in his very learned judgment, proceeding very much on this basis, says, "It is perfectly clear that if the practice of the Court of Chancery in England is inconsistent with international law, no Court of a foreign country is bound to respect it." And again, in commenting on the 19th article of the Treaty of Union, he is represented to have added, "Scotland has a law different from that of England; and quoad that law, it is an independent state entitled to demand from England adherence to the rules of international law which determine the rights of natives of foreign states which may be made the subject of action in her Courts." And again, "If this case be appealed to the House of Lords, it will have to determine, not any rule as to Chancery practice, but a question as to international law,—that is, quoad hoc, the law of Scotland. The House of Lords cannot, or, at all events, ought not to consider, in reference to the question brought before them by an appeal from this judgment, any other point than this, whether, according to the law of nations, this rule of the Chancery Court of England must be respected by a foreign Court, when the people of that foreign country, in recognising it would be thereby subjected to grievous expense and many inconveniences; and when, moreover, the practice itself is contrary to all sound principles of international law."

I think it to be unnecessary to follow in these particulars or to criticise the reasons of the Lord Ordinary, and I may pass from

this part of the case by observing that, in my opinion, no question of international law arises. There is no real conflict of jurisdiction between the two judicatories. It presents a case of concurrent jurisdiction and no more. Though there is no conflict of jurisdiction, there may arise what would more properly be called a collision between the practice of the independent Courts of separate divisions of the same United Kingdom, which would properly be settled by the judicatories of the two countries acting in ancillary courtesy to each other, or by this House, as the supreme and final Court of Appeal, or, if it cannot be effected otherwise, by legislation of the Imperial Parliament.

There remains only for me to consider whether the interlocutor of the Inner House can be maintained so far as it sequestrates the estate and pronounces an interdict against the trustees. There is no question as to the jurisdiction of the Court to decree a sequestration, but as to whether the authority to do so ought to have been exercised. On this question I entertain serious doubt. When a sequestration is decreed it at least implies that the fund is in danger. No danger existed, and the interdicted trustees had committed no default, and, on the contrary, have been active and straightforward in the performance of their duties.

I understand, however, in the course of the argument, that the appellants' counsel did not question the authority of the Court of Session to decree a sequestration, or the due exercise of its judicial discretion, and on that it seemed to me that it only remained to settle the terms of capitulation.

As to the appointment of a judicial factor, which seems to be a necessary sequence of the sequestration, I shall only say that I doubt whether his appointment, liable as it may be to abuse, is an equivalent in protection to the fund being brought into Court and paid out to the legatees on the orders of the Court.

On the whole, I concur in the order about to be proposed for your adoption by the noble and learned Earl.

Ordered and adjudged.—So much of the Interlocutor of the Inner House bearing date the 29th of February, 1884, as finds, declares and decerns in terms of the declaratory conclusions of the

H. L. (Sc.)
1885
EWING
v.
ORR EWING.

summons, and also so much thereof as interdicts, prohibits and discharges the appellants from accounting for the trust estate or any part thereof, to any person or persons other than the judicial factor, reversed.

Declaration (the respondents by their counsel consenting thereto), that Malcolm Hart Orr-Ewing, the infant plaintiff in the English suit, by George Wellesley Hope, his present next friend in that suit, or by such other person as may from time to time be admitted by the High Court of Justice in England as the next friend of the said infant plaintiff, is to have notice of and to be at liberty to attend the taking of all accounts of the judicial factor from time to time in this action, and all proceedings thereon, and to make all such applications to the Court of Session on all matters relative to the sequestered trust estate or the trust funds arising therefrom, for any purpose, including claims for expenses, as might be competent to the said infant plaintiff, or any one on his behalf, if he were a party on the record.

In other respects, subject to the aforesaid declaration, interlocutors of the Inner House under appeal affirmed.

Cause remitted to the Court below.

The costs of all parties to the appeal to be paid out of the testator's estate, and to be paid by the judicial factor.

Lords' Journals, 24th July, 1885.

Solicitors for appellants: *Lattey & Hart.*

Solicitor for respondents: *D. E. Chandler, for F. J. Martin, W.S. Edinburgh.*

[HOUSE OF LORDS.]

SANDEMAN . . . . . APPELLANT;

AND

THE SCOTTISH PROPERTY AND BUILDING SOCIETY AND OTHERS . . . . RESPONDENTS.

H. L. (Sc.)
1885
June 29.

Superior and Vassal—Irritancy ob non solutum canonem—Statute 1597, *c.* 250—*Extinction of Sub-feu held under defaulting Vassal—Right of Sub-feuar to purge the Irritancy.*

An action of declarator of tinsel of a feu ob non solutum canonem is an irredeemable adjudication of the feu in favour of the superior; but the sub-feuar can protect himself from eviction by paying the superior's full preferable debt, and when he does so he has a claim of relief pro ratâ against all the owners of the land on which that debt is charged.

It is provided by the Scotch Statute 1597, c. 250, that the vassal shall lose the feu of his lands by his failure to pay the feu duty for two years together, in like manner as if an irritant clause to that effect had existed in his feu contract.

By feu contract A. disponed in feu farm to B. and C. five acres of building land, with an annual reddendo of £480. The contract of feu contained the express declaration "that in case at any time two years' feu duty shall be fully resting, owing and unpaid together, then this present feu right, and all that may follow hereon, shall, in the option of the superior, become void and null. B. and C. divided the lands between them, and each granted, inter alia, sub-feus (narrating in the deeds conveying the land the above-mentioned feu contract) of portions of the five acres to D. and E. respectively.

Upwards of four years' feu duties became due. A. raised an action of declarator of irritancy ob non solutum canonem. D. and E. contended that the irritancy must be confined to the mid-superiorities created by B. and C. and had no effect on the portions of land sub-feued on their tendering the sub-feu duty reserved on each:—

Held, reversing the decision appealed from, but affirming *Cassels* v. *Lamb* (12 Court Sess. Cas. 4th Series, 722), that the superior's right was not merely a charge upon the mid-superiorities, but a right to annul the charter of his feuars and all sub-feus made by them, to the effect of resuming the full beneficial possession of the lands feued.

Held, also, that the circumstances did not warrant the conclusion that the superior had consented to the sub-infeudation.

APPEAL from a judgment pronounced by the Second Division of the Court of Session, Scotland, in an action of declarator of

H. L. (Sc.) 1885 SANDEMAN v. SCOTTISH PROPERTY SOCIETY.

irritancy ob non solutum canonem, raised by the appellant, Frank Stewart Sandeman, against certain parties. Of these the Scottish Property Investment and Building Society and its liquidators and David Crabb are the only respondents who have lodged defences to the action. The substantial question for determination was whether, when a feu is irritated ob non solutum canonem under the Statute 1597, c. 250 (1), or an irritant clause in the feu right, this involves the forfeiture or extinction of a sub-feu held under the defaulting vassal.

By feu contract dated the 9th, 12th, and 18th, and recorded the 24th of February, 1876, the appellant Sandeman sold in feu farm five acres or thereabouts of land in Dundee to Stiven and Gibson, equally between them pro indiviso, and their respective heirs and assigns. One of the provisions of this feu contract was that "the said disponees and their foresaids shall be bound, within four years from the term of Whitsunday in the year 1875, to build a good and substantial house or range of houses of stone and lime, with roofs of slate, upon the ground hereby feued, of at least the annual value of double the amount of the yearly feu-duty payable under these presents, and to have and keep in good repair a house or houses of that value upon the said ground in all time thereafter, which conditions, provisions, declarations, and stipulations above written are hereby appointed to enter the register of sasines along with these presents, or to be engrossed in any instrument following hereon, and in all transmissions and investitures of the piece of ground hereby disponed, or validly referred to therein as contained in this feu-contract, otherwise

(1) The Act was as follows:—"Our Soveraine Lord, and Estates of this present Parliament, have and consideration of the greate damnage and straith, quhilk his Majesty and lieges of this realm susteinis, throw evill and untimous payment of the few dewties of their landes, set in few-ferme: therefore statutis and ordainis, that in case it happen in time cumming ony vassall or fewer, hald any landes in few-ferme, of our Soveraine Lord, or of ony other superiour immediately in few-ferme, to failzie in making of payment of his few-dewty to our Soveraine Lordis Comptroller, or uther havand power of him, or to uther immediate superiour, or uthers havand power of him, be the space of twa zeires, haill and togidder: that they sall amitte and tine their said few of their saids lands, conforme to the civil and cannon law: Sik-like and in the same manner, as gif ane clause irritant were specially ingrossed and insert in their saids infeftmentes of few-ferme."

the same shall as an investure be, in the option of the said first parties, null and void." The feu-contract also set out that the feu duty was to be £480 per annum, with a duplicand at the end of every twenty-fifth year from and after Whitsunday, 1875. The deed then continues :—"Declaring, as it is hereby specially provided and declared, that in case at any time two years' feu duty shall be fully resting-owing and unpaid together, then this present feu right and all that may follow hereon, shall, in the option of the superior, ipso facto become void and null, without the necessity of any declarator or process of law to that effect, and the superior shall, instantly and without any warning, be entitled and at liberty to remove the said disponees and their foresaids from the said piece of ground . . . . And the said disponees further bind and oblige themselves and their foresaids to build and maintain a house, or range of houses, of the value and description hereinbefore set forth, on the ground hereby feued, and to implement and fulfil all the other conditions, provisions, and declarations hereinbefore contained . . . . Declaring hereby, notwithstanding anything herein contained to the contrary, that the personal obligation hereby undertaken by the said disponees, and hereby incumbent on them, for payment of the feu-duty and performance of the several prestations and obligations foresaid, shall cease and come to an end so soon as a bonâ fide sale of the subjects hereby conveyed shall take place, and a notice of change of ownership of the feu be given to the superior, in terms of 'The Conveyancing (Scotland) Act, 1874,' and the purchaser's infeftment has been duly registered in the appropriate register of sasines, provided that at the date of such notice there shall be erections of the description before mentioned upon the ground of the value before specified, as the same shall be ascertained in case of difference by two arbiters mutually chosen."

By feu contract, dated the 23rd and 25th of February, and recorded the 26th of February, 1876, Stiven and Gibson sold and in feu farm disponed to Alexander McCulloch and his heirs and assigns whomsoever 22 poles and 18¾ yards, or thereby, "of the piece of ground feued out by Frank Stewart Sandeman" to Stiven and Gibson. The feu duty payable by McCulloch was stipulated to be £22 12*s.* 4*d.*, with a duplicand every twentieth year. In

H L. (Sc.) 1885 SANDEMAN v. SCOTTISH PROPERTY SOCIETY.

this deed it is inter alia declared that the sub-feu right is granted always with and under the real burdens and conditions, provisions, and declarations specified in, inter alia, the feu contract entered into between Sandeman and Stiven and Gibson. There is also this clause: "And the said" Stiven and Gibson "bind themselves to pay and free and relieve the said Alexander McCulloch and his foresaids of all feu duties and casualties payable to or exigible by their own superiors now and in all time coming."

The piece of ground of five acres feued by the appellant to Stiven and Gibson was in reality held by the latter in trust for themselves and David McDonald; and under an agreement between them for dividing the ground and the mid-superiority of the portion feued to McCulloch, Stiven and Gibson granted three dispositions, with consent of McDonald, whereby they disponed to each of them a portion of the subjects, and allocated thereon a portion of the cumulo feu duty of £480 payable therefor. The portion of ground conveyed to Gibson consisted of 226·16 poles, and included therein the piece of ground feued to McCulloch. The total feu-duty payable by Gibson was £134 17*s.* 10*d.* These three dispositions were executed on the 4th and recorded on the 5th of December, 1876.

The portion of the ground, consisting of 22 poles 18¾ yards, feued to McCulloch, was by disposition dated the 12th and recorded the 24th of March, 1876, disponed by him to the Heritable Securities Association; and the latter, by disposition dated the 18th and 20th and recorded the 24th of January, 1877, disponed the same to the respondents, the Scottish Property Investment Company Building Society.

A portion of the ground, extending to about 32·73 poles, which had been acquired by Stiven under the disposition recorded the 5th of December, 1876, was by feu contract dated the 27th and 30th of April and recorded the 1st of May, 1877, disponed by Stiven to David Crabb, one of the respondents, for payment of an annual feu duty of £32 14*s.* 7*d.* On this piece of ground Crabb erected buildings costing £3000; McCulloch had also erected buildings costing about £2000. The feu duty of McCulloch's feu, amounting to £22 12*s.* 4*d.*, was paid to his immediate superior up to Martinmas, 1878. The estates of Gibson and Stiven were

sequestrated on the 15th of February, 1879, and the 26th of February, 1879, respectively, and since then the respondents, the Scottish Property Investment Company Building Society have declined to make payment to the mid-superior Gibson of the feu duty. Crabb also paid his feu duty up to the date of Stiven's sequestration in 1879. Since then he had deposited the amounts in bank.

On the 17th of January, 1882, Sandeman brought this action against Stiven and Gibson, his immediate vassals in the same, and also against David Myles, trustee on the sequestrated estates of Stiven; Ritchie, trustee on Gibson's estates; McDonald; McCulloch; the Scottish Property Investment Company Building Society; Crabb and his heritable creditors; and others, claiming to be proprietors, tenants, or occupiers of, or heritable creditors, or otherwise interested in the land—concluding to have it found and declared that the feu-duties for the four years from Martinmas, 1877, to Martinmas, 1881, at the rate of £480 per annum, and amounting in all, with interest thereon as of the 11th November, 1881, to the sum of £2088, "payable to the pursuer out of the lands, subjects, and others after described, have remained unpaid for the years and terms before specified; that the defenders have thereby controvened the terms of the feu-contract entered into between" Sandeman and Stiven and Gibson, "and incurred the irritancy specified in the said feu-contract, and have also incurred the irritancy introduced by the statute 1597, c. 250, and have lost and forfeited all right and title to the lands, subjects, and others aftermentioned ob non solutum canonem." And that it ought to be declared that the "said feu-contract has, with all that has followed thereon, become void and null; and that the pursuer may enter into possession of the subjects thereby conveyed." The action also sought a decree of removing.

In their defences, the Scottish Property and Building Society, after referring to the feu by Sandeman and Stiven and Gibson, and the arrangement between Stiven, Gibson, and McDonald to divide the piece of ground, and the mid-superiority of the portion feued to McCulloch, averred that they, Stiven and Gibson, executed the three separate dispositions on the 4th of December, 1876, and that they, with McDonald, disponed to each of them a portion of

H. L. (Sc.) 1885 SANDEMAN v. SCOTTISH PROPERTY SOCIETY.

the subjects, and allocated to each thereon a proportion of the cumulo feu-duty effeiring thereto. And that the said disposition being duly recorded, the said disponees thereupon become duly entered with the superior in the respective portions of the said subjects conveyed to them, in terms of the Conveyancing (Scotland) Act, 1874. And that the superior sanctioned and recognised the sub-feuing of the ground in question. That the sub-feu duty of £22 12*s.* 4*d.* had not been paid to Gibson because of his bankruptcy, but they were and had all along been ready and willing to make payment thereof on receiving a proper discharge.

Crabb's averments were substantially the same.

The pleas in law for the appellant were :—

1. The feu duty and interest thereon payable in respect of said subjects, and amounting in all to the sum of £2088, having remained unpaid for the years and terms libelled, the pursuer is entitled to decree of declarator in terms of the conclusions of the summons.

2. Separatim, the feu duty for the said subjects having remained unpaid for more than two years, the pursuer is entitled to decree of irritancy ob non solutum canonem, with expenses, as concluded for.

The pleas in law for both defenders were somewhat similar. The following were, inter alia, the pleas in law for the respondents, the Scottish Property Investment Company Building Society :—

4. The present defenders being sub-feuars of the foresaid portion of the said subjects vested in them, they are only liable for the feu duty payable under the feu contract thereof, and are entitled, on payment of the foresaid arrears of the said feu duty, to absolvitor from the conclusion of the action.

5. In any event, the said Henry Gibson having, by the recording of the foresaid disposition in his favour, been entered with the superior in the portion of the subjects thereby conveyed, including therein the mid-superiority of the subjects vested in the present defenders, the latter are entitled to absolvitor on payment of the arrears of feu duty effeiring to the portion of the said subjects thereby vested in the said Henry Gibson.

On the 25th of July, 1882, the Lord Ordinary (1) pronounced an interlocutor, inter alia, as follows :

Finds it is not disputed that the feu-duty remains unpaid for the terms specified, but finds that the subordinate feu rights held by the said defenders David Crabb and the Scottish Property Investment Building Society, though not sufficient to entitle them to resist the action as against the original feuars, William Stiven and Henry Gibson, and the trustees upon their sequestrated estates, are sufficient to entitle the said defenders to maintain their possession

(1) Lord Lee.

of those portions of said feu which are described in their feu contracts: And finds that the pursuer is not entitled to decree against them as contraveners of the feu contract libelled, or to maintain the present action to the effect of forfeiting their rights as sub feuars, and of removing them from possession of their portions of the feu: Therefore assoilzies the said defenders from the conclusions of the action in so far as the same may include declarator that they have lost and forfeited all right and title to those portions of the lands included in their feu rights, or decree of removing against them therefrom, and decerns: Quoad ultra, finds, declares, and decerns in terms of the conclusions of the summons, under burden of the feu contract between William Stiven and Henry Gibson and Alexander M'Culloch, dated the 23rd and 25th of February, 1876, and recorded in the general register of sasines 26th February same year, and of the rights of the defenders the Scottish Property Investment Building Society in the same, and under burden likewise of the feu contract between William Stiven and David Crabb, dated the 27th and 30th of April, and recorded in the general register of sasines of the 1st of May, 1877, and of the rights of the said David Crabb under the same.

Against this interlocutor the appellant presented a reclaiming note; and on the 21st of February, 1883, the Second Division (Lord Rutherfurd Clark dissenting) adhered (1).

An appeal to this House was lodged, but the hearing was postponed until a similar case under the name of *Cassels* v. *Lamb* before all the judges composing the two Divisions of the Court of Session should be disposed of. The judgment in *Cassels* v. *Lamb* was pronounced on the 6th of March, 1885, when the majority, namely, The Lord President (Inglis), Lords Mure, Shand, Rutherfurd Clark, Adam, McLaren, and Kinnear held (overruling *Sandeman* v. *Stiven*) that a decree of declarator of irritancy ob non solutum canonem, whether under the statute of 1597, c. 250, or an irritance clause in the feu right, annuls the vassal's right and all that has followed thereon, including the rights of the sub-vassals.

The minority of a contrary opinion were the Lord Justice Clerk (Moncreiff), and Lords Deas, Young, Craighill, Lee, and Fraser (2).

May 4, 5, 12, 13. *The Solicitor-General for Scotland* (*Asher*, Q.C.), and *H. Johnston* (with them *C. Neish*):—

The appellant is entitled to implement the conditions on which he parted with his property, and to have his property back

(1) 10 Court Sess. Cas. 4th Series, 614. (2) 12 Court Sess. Cas. 4th Series, 722.

H. L. (Sc.) 1885 SANDEMAN v. SCOTTISH PROPERTY SOCIETY.

as he gave it out. The sub-vassals took their feus with notice of those conditions, and have taken no steps to purge the irritancy. The appellant did not seek to forfeit any one's right, except his own immediate vassal's; but the right of his immediate vassal being at an end, those who have no contract with the superior, the appellant, nor with any one who can derive title through him, should remove from what is his ground no longer burdened by the feu: Dallas' Styles, 1697 Ed., p. 344. Though there might not be any report in practice of a similar case, there was no absence of precedent: Bell's Convey. (2nd Ed.), vol. ii., p. 729; see *Beveridge* v. *Moffat* (1). There was nothing in the principles of feudal law which excepts a contract of feu from the ordinary rules regulating contracts.

The irritancy ob non solutum canonem was recognised by statute, and the preamble of the Act of 1597, c. 250, was not unimportant. The obligation in a feu contract for payment of feu duty affected every part of the subjects feued. The superior could not refuse to recognise sub-division of the subjects, but any allocation of the feu duty without his express consent was res alios as regards him. And just as the prime superior cannot multiply the sub-vassal's superiors, so he cannot be compelled to seek from many that which was stipulated to be paid by one. The cumulo feu duty is a debitum fundi affecting every part of the land feued. Hence if a sub-division is made of the original feu without the prime superior's consent, he is entitled to require his whole cumulo feu duty from any disponee of a parcel; because though the sub-feuar may not have become personally liable for it, the ground of his parcel may be pointed for the whole: *Wemyss* v. *Thomson* (2); *Raeburn* v. *Geddes* (3); *Creditors of Eyemouth* (4). A sub-vassal, if his immediate superior's right is declared void, is no longer entered with any superior, and the result of the judgment appealed from is, either that the respondents are vassals without a superior, which is impossible, or that the appellant is compelled against his will to become their superior upon conditions he never agreed to.

(1) 9 Jan. 1842. 4 Court Sess. Cas. 2nd Series, pp. 1381, 1385, 1387.

(2) 14 Court Sess. Cas. 1st Series, 233.

(3) 9 Court Sess. Cas. 3rd Series, 20.

(4) 1757. (Dic. Dec.) 5 Br. Sup. 856.

[LORD WATSON mentioned *Abbot of Cambuskenneth* v. *Ramsay* (1).]

[They also commented on Stair, 2. 3. 28. & 32; 2. 4. 23. & 36; 2. 11; 25; 3. 3: 26. & 31; 4. 9. 2; Erskine, 2. 5. 7; 2. 5. 79; Kame's Eluc. art. 11; Dirleton's "Doubts" on Forefaulture; *Marquis of Huntly* v. *Laird of Cairnborrow* (2); *Campbell* v. *Argyle's Vassals* (3); *Magistrates of Edinburgh* v. *Horsburgh* (4); *Rossmore's Trustees* v. *Brownlie* (5); *Coltart* v. *Tait* (6); *Moncrief* v. *Balnagowne* (7); *Carruthers* v. *Johnston* (8).

Davey, Q.C., and *R. U. Strachan*, for the respondents, the Scottish Property and Building Society:—

The interlocutors of the Court below were correct. Under a contract of feu the vassal is entitled, when not expressly prohibited, to sub-feu the lands for an adequate avail, and the sub-feu so constituted is binding on, and cannot be challenged by, the superior: see Lords Glenlee, Meadowbank, and Cockburn, in *Ross* v. *Heriot's Hospital* (9); Conveyancing (Scotland) Act, 1874, s. 4, sub-s. 2. And being sub-feued for an adequate avail, the subject becomes the absolute property of the sub-feuer: Bell's Prin. 788; Bell's Lectures, vol. ii., p. 635.

The forfeiture here extends only to the feu-right given off in favour of the defaulting vassal, and vests that mid-superiority in the over superior to whom the arrears of feu duty are due, leaving intact the right of property in the sub-vassals, his liability being limited to the amount of his sub-feu duty: see *Hyslop* v. *Shaw* (10); *Marquis of Tweeddale's Trustees* v. *Earl of Haddington* (11); *Creditors of Eyemouth* (12). Such a result as that the irritancy of one series of feus would annul all that came after, would not only be going beyond the Act of 1597, but would be

(1) 1525. Mor. 7179.
(2) M. 4170.
(3) M. 4176.
(4) 12 Court Sess. Cas. 1st Series, at p. 597.
(5) 5 Court Sess. Cas. 4th Series, 201.
(6) 1782. Mor. 9313.
(7) Jan. 29, 1635. Mor. 9315, 9317.
(8) 1737. Mor. 7235.
(9) June 6, 1815. 18 F. C. 393, at p. 402.
(10) 13 May, 1863. 1 Court Sess. 3rd Series, 535, 551.
(11) 25 Sept. 1880. 7 Court Sess. Cas. 4th Series, 620, 627.
(12) 1757. (Dic. Dec.) 5 Br. Sup. 856.

H. L. (Sc.) 1885 SANDEMAN v. SCOTTISH PROPERTY SOCIETY.

entirely subversive of the system of sub-infeudation. It would destroy the security of title, and subject the holders of real estate to oppressive confiscation of their rights. It might be equally ruinous to purge, for the sub-vassal might have no sooner purged the feu-duties owing by one superior, than he might have to purge another, and so on, up till the Crown was reached. The maxim "Resoluto jure dantis, resolvitur jus accipientis" was not applicable here, for the dominium utile is neither dependent nor forms a burden on the superior's right. It has a legal basis quite independent of that right, and remains therefore unaffected by its forfeiture. The mid-superiority, the only thing it depends on, is not extinguished by the forfeiture. It is merely transferred to and becomes vested in the immediate superior. And there was no feudal difficulty in the way of this being done. Secondly, the circumstances here that the feus were granted as a building speculation, and that the land was laid out in lots according to a plan, shewed clearly that the sub-feus were granted with the superior's consent, and therefore he was barred personali exceptione.

[They also commented on Act 1457, c. 71; Erskine, 2. 5. 44; *Beaton* v. *Scot* (1); *The King* v. *Tullibarden* (2); *Abbot of Cambuskenneth* v. *Ramsay* (3); *Prior of Charterhouse* v. *Borthwick* (4); *Mason* v. *Mason* (5); *Prudential Assurance Company* v. *Cheyne* (6); *Bald* v. *Buchanan* (7).]

Solicitor-General for Scotland, in reply.

The House took time for consideration.

June 29. LORD WATSON:—

My Lords, in disposing of this appeal from the Second Division of the Court of Session, your Lordships have had the advantage of considering the opinions delivered in the subsequent case of *Cassels* v. *Lamb* (8), which was decided by the First Division, after consultation with the whole Court, upon the 6th of March, 1885.

(1) 1672. M. 3664.
(2) 1517. M. 7179.
(3) 1525. M. 7179.
(4) 1533. M. 7180.
(5) 1557. M. 7180.
(6) June 4, 1884. 11 Court Sess. Cas. 4th Series, 871.
(7) Mor. 15084.
(8) 12 Court Sess. Cas. 4th Series, 722.

All the judges were of opinion, and it does not appear to me to admit of doubt, that the point arising for decision, in the two cases, was precisely the same. In this case the Lord Ordinary (1) and three of the judges of the Second Division, Lord Rutherfurd Clark dissenting, rejected the pleas urged by the appellant; and in *Cassels* v. *Lamb* (2) they adhered to their former opinions, with the concurrence of Lords Deas and Fraser, whilst three of the judges of the First Division and three lords ordinary, agreed with Lord Rutherfurd Clark that the present case was not well decided, there being thus a majority of one in favour of the argument which has been addressed to your Lordships for the appellant. Accordingly the First Division, in *Cassels* v. *Lamb* (2), pronounced a judgment which is in direct conflict with the interlocutors under appeal, and it is for your Lordships to determine which of these decisions is right.

Since the passing of the 20 Geo. 2, c. 50, all lands in Scotland (save burgage holdings and a few allodial possessions) have been held in feu-farm from the Crown, or from subject superiors. That Act abolished the military tenure of ward, converting ward into feu holdings, and substituting in the case of land held of the Crown a blench duty, and in the case of lands held of subject superiors an annual rent or feu duty to be modified failing agreement by the Court, for the prestations and casualties peculiar to ward holding. In the opinions of some of the judges composing the minority in *Cassels* v. *Lamb* (2), there is much learned discussion regarding the origin and early history of feu rights, their resemblance to the Roman contract of emphyteusis, and other cognate matters; and it seems not to be doubtful that these rights were not, strictly speaking, part of the old feudal system, although they had a recognised existence in the law of Scotland for centuries before the final abolition of military tenure. These speculations are of great antiquarian interest, but they do not, in my opinion, throw much, if any, light upon the present state of the law.

The effect of progressive legislation upon the position and interests of a superior of lands in Scotland is thus concisely stated by the late Mr. Duff, one of the most accurate of recent writers

(1) Lord Lee. (2) 12 Court Sess. Cas. 4th Series, 722.

H. L. (Sc.) 1885 SANDEMAN v. SCOTTISH PROPERTY SOCIETY. Lord Watson.

on conveyancing: "The dominium directum, or superiority, which, in the ages of personal military service, was the more eminent right, is now in substance reduced to a mere security over the lands for a yearly payment by the vassal, and a fine or grassum on the renewal of the investiture, fortified by an express or implied irritancy" (1). All the institutional writers from Lord Stair downwards are agreed that the annual reddendo payable by the feuar is a debitum fundi, or, in other words, a debt, in which the superior is creditor, forming a charge upon the ipsa corpora of the lands feued. That debt is not, in any proper sense, a burden upon the feuar's right; it represents the estate or real interest of the superior in the lands, and it stands upon his own sasine, and not upon his vassal's infeftment. The feu charter, by virtue of which the vassal becomes vested in the dominium utile, does not constitute, but limits, the estate of the superior; and consequently the superior's reddendo, which is in substance a real right reserved to the superiority out of the lands feued, is an heritable estate or interest in the lands paramount to the estate of the vassal.

In the case of modern feus, the annual rent or feu duty reserved by the superior almost invariably represents the whole or a portion of the price, in consideration of which he disposes the dominium utile to his feuar. The appellant in the present case, by a contract of feu dated and recorded in February 1876, disponed in feu-farm to Stiven and Gibson five or thereby acres of building land in Dundee, with an annual reddendo of £480 sterling, which at twenty-two and a half years' purchase, the ordinary rate of conversion, was equivalent to a capital sum of £11,800. At the time when the appellant brought his action, the feu duties payable to him were in arrear to the extent of £2088, or upwards of four years annual payments.

It has not been disputed, either by the Bench, or at the bar, that, had Stiven and Gibson retained the land thus feued to them in their own hands, the security of the appellant for these arrears, as well as for future duties, would have extended to each and every part of the corpus of the land; and that the appellant would have had his remedy against the land either by poinding the

(1) Duff's Feudal Conveyancing, sec. 39.

ground, or by declarator of irritancy ob non solutum canonem. But Stiven and Gibson made two sub-feus of portions of the five acres, one of 22 poles 18¾ yards, for an annual reddendo of £22 12*s.* 4*d.*, and another of 32·73 poles for a reddendo of £32 14*s.* 7*d.*, the reddendo being in both cases at a somewhat higher rate per square yard than the feu duty reserved in the original feu contract with the appellant. The respondents in this appeal are now in right of these two sub-feus; and their contention (to which effect has been given in the interlocutors of the Lord Ordinary and the Second Division) is that the appellant's remedy, by declarator of irritancy, can no longer have effect against the portions of land sub-feued, but must be confined to the two mid-superiorities created by his immediate vassals.

The legal propositions, for which the respondents argued, appear to me to amount in substance to this, that the character of the superior's reserved right undergoes a radical change whenever the vassal, instead of disponing, sub-feus the land without the superior's consent; that the superior's right of irritancy for non-payment of his reddendo then ceases to attach to the lands which he feued, and attaches only to the mid-superiority created in the person of his vassal; and, consequently, that the superior cannot, in satisfaction of arrears of feu-duty, recover the lands themselves, but must content himself with annulling the mid-superiority, and so becoming the immediate superior of the sub-feuar, with a right to the reddendo stipulated in the title of the sub-feu. No doubt these propositions were qualified by the condition that the sub-feu, in order to be effectual against the prime superior, must be for "a competent avail." But what is "a competent avail?" As I understand the words, they signify an annual rent or duty fairly representing the value of the land at the date of the sub-feu. But it is obvious that owing to a fall in the market or to local causes, the land may be of less value, at the date of the sub-feu right, than when it was originally feued; and in that case the "competent avail" payable by the sub-feuar will be less than the original reddendo. Moreover, there being no privity of contract between the prime superior and the sub-feuar, the latter may pay to the mid-superior, although the reddendo due by him to the over-lord is still

H. L. (Sc.) 1885

SANDEMAN v. SCOTTISH PROPERTY SOCIETY.

Lord Watson.

unpaid, so that practically the over-lord might lose all real security for his arrears. If Stiven and Gibson had, immediately after they obtained their feu right in 1876, sub-feued the whole five acres to A., with a reddendo of £480 per annum (which would then have been a competent avail), and A. had made regular payment to his superiors, the appellant would, according to the judgment in this case, have had no real security for the £2088 of arrears due to him, at least a decree of declarator of irritancy ob non solutum canonem would only have given him a future right to receive £480 per annum from A. instead of his original vassal, whose right of mid-superiority was annulled, his claim for arrrears being thereby extinguished.

I have been unable to find, in the law of Scotland, either principle or authority upon which these propositions can be supported. It is conceded by the judges who decided this case, and those who, in *Cassels* v. *Lamb* (1), agreed with them in opinion, that there is no express authority for holding that a superior insisting for a decree of irritancy must take back the lands which he feued out, subject to all base rights granted by his vassal, to which he was not a consenting party. In affirming that to be the law, it humbly appears to me that their Lordships have ignored the true character of the superior's right, as a preferable right affecting the the lands, as well as the true nature of his remedy by declarator of irritancy.

The character and extent of the superior's right of preference is thus defined by Mr. Bell:—"The superior has, by means of his real right in the lands, a preference over purchasers and creditors, in voluntary or judicial sales, and in rankings of creditors. It extends over the whole lands feued, though divided in sub-feuing or on sale; each owner or sub-feuar having relief against the others for excessive payment." (2) In my opinion it is settled law, and it has not, in this case, been controverted, that in the event of a sale of the dominium utile by the creditors of a sub-feuar, the appellant would have been entitled to rank preferably upon the price realized for the full amount of the arrears due to him, leaving the selling creditors to seek their relief against their debtor's immediate superior, or against other

(1) 12 Court Sess. Cas. 4th Series, 722. (2) Bell's Prin. sec. 697.

sub-feuars or disponees. That does not necessarily establish the right of the appellant to annul the sub-feu rights when an irritancy has been incurred by his own vassal; but it does shew conclusively that, notwithstanding the granting of sub-feus, the appellant's cumulo feu duty continued, as before, to be a first charge upon the land itself, and not merely a charge upon the mid-superiorities.

In *Cassels* v. *Lamb* (1) the Lord Justice Clerk (Moncreiff) said: "I have only to repeat that the question now considered leaves the superior's ordinary feudal remedies for recovering his feu duties out of the whole territory of the original grant entirely untouched. No such matter is involved in the present demand, nor indeed could be." The noble and learned Lord rightly states that no other remedy than tinsel of the feu could be demanded by the appellant in this action; because it has long been matter of express judicial decision that a superior, who takes a decree of irritancy, thereby passes from all claim for arrears of feu duty. But it may be useful to consider what means the superior may, according to the law of Scotland, use for recovery of his feu duty out of the territory of the original grant, when it has been in whole or part sub-fued.

According to Lord Stair, "the superiority carrieth a right to the duty of the reddendo really against the ground of the fee, for which he hath action of poinding of the ground against the vassal and all successors to him, whereby he may apprise the goods upon the ground, or the ground right and property of the lands, the said duties being liquidated, upon repayment whereof, the lands are redeemable as in other apprisings." (2) By obtaining a decree of poinding for the arrears in question, the appellant could have swept away all moveables belonging to these respondents which might at any time have been upon their land; and if any part of their sub-feu, whether consisting of land or houses, had been let to tenants, then he could, by his attachment of their moveables, have recovered the full amount of the rents payable by the tenants to the respondents, until his arrears were fully paid. In early times a summons of poinding of the ground contained a conclusion "for apprising the ground and property of

(1) 12 Court Sess. Cas. 4th Series, 748. (2) Stair's Inst. 2. 4. 8.

H. L. (Sc.) 1885 SANDEMAN v. SCOTTISH PROPERTY SOCIETY. Lord Watson.

such portion of said lands as is equivalent unto the said resting feu duties." (1) The competency of using that remedy after the Act 1672, chap. 19, had introduced adjudications in place of apprisings, was doubted by Lord Stair (2), and it has long fallen into disuse; but I see no reason to doubt that a superior instead of apprising may now adjudge the land, for payment of arrears of feu duty, because an adjudication of the land which is affected by it may be led upon every debt which is a debitum fundi. Mr. Duff states expressly that "adjudication of the dominium utile is competent for arrears of feu duties" (3); and Mr. Bell in his Commentaries (4), makes the same statement of the law.

The superior has another, and what has hitherto been considered his most effectual remedy for non-payment of his feu duties, in the action of irritancy ob non solutum canonem. Mr. Erskine (5) speaks of this irritancy as "the only casualty, or rather forfeiture, proper to feu holdings;" but it is in no sense a feudal casualty, and is more correctly described by Mr. Bell (6) as one of the means the superior has of compelling payment of his feu duties. The legality of a stipulation to the effect that the vassal should forfeit his feu to the superior, by failure to pay his feu duty, appears to have been recognised from the earliest period; and the Act, 1597, c. 250, provided that the vassal shall lose the feu of his lands, by his failing to pay the feu duty for two years together, in like manner as if an irritant clause to that effect had been inserted in his infeftment of feu farm. I am inclined to think that the Act must have been declaratory of the law, from its own terms, and also because, so early as the year 1525, it had been decided by the Court in the case of an ecclesiastical feu, that if the feuars, or any of their heirs or successors, ceased, by the space of two years, to make payment of any part of the feu duty contained in their charter and infeftment, they were liable to have their feu right reduced at the instance of the superior "albeit na sic special provisioun be maid thairanent in the chartour or infeftment:" *Abbot of Cambuskenneth* v. *Ramsay* (7).

(1) Stair's Inst. 4. 23. 10.
(2) Stair's Inst. 4. 23. 8.
(3) Feud. Conveyancing, sec. 56 (5).
(4) Bell, Com. 5th ed. vol. i. pp. 715, 716.
(5) Ersk. Inst. 2. 5. 25.
(6) Bell's Prin. Law of Scotland, sec. 697.
(7) 8th March, 1525; Balfour, Pract. (1754 ed.) anent feuis, No. 4; Mor. Dict. 7179; and 1 Fol. Dic. 483.

In this case the original feu right granted by the appellant to Stiven and Gibson contains an express declaration "that in case at any time two years' feu duty shall be fully resting, owing, and unpaid together, then this present feu right, *and all that may follow hereon*, shall, in the option of the superior, become void and null." If that condition had been less severe than the irritancy which is made an implied condition of feu rights by the Act of 1597, it would have superseded the statutory condition, as was decided in *Lady Barholm* v. *Dalrymple* (1). But I am of opinion that the irritancy stipulated in the feu contract of February, 1876, is, in substance and effect, the same as the irritancy provided by 1597, c. 250. I do not think that the words "and all that may follow thereon" add to the scope and force of the irritancy. On the contrary, they appear to me to leave it to the law to determine how far rights derived from the immediate vassal by singular successors, including sub-feuars, are involved in the extinction of his feu right; and I am accordingly of opinion that the present case must be dealt with and decided, as if the appellant was seeking to have an irritancy declared under the provisions of the Act of 1597.

The preamble of the Act, which sets forth the damage which His Majesty and the lieges of the realm sustained through "evill and untimous payment of the feu dewties of their lands," plainly shews that it was the purpose of the legislature to secure to superiors a stringent remedy for non-payment of these duties. Then it is enacted that the defaulting vassal is to amit and tyne his feu "conform to the civill and canon law." The remedy given to the over-lord against the "conductor" or "emphyteuta" by the civil law in the event of his failing for three years, and by the canon law in the event of his failing for two years to pay his annual tribute, was a right of re-entry upon the lands. In these events the civil law (2) authorized the over-lord "eum a prædiis emphyteuticariis repellere;" and by the canon law ecclesiastical houses were empowered (3) "et antiquum statum locatæ sive emphyteuticæ rei exigere, et ejicere de emphyteusi, sive de locatione, non valentem de emponematis actionem aliquam contra

(1) 27 Nov. 1750; Mor. Dic. 7187. (2) Cod. Lib. iv. tit. 66, sec. 2.
(3) Nov. 120, cap. 8.

H. L. (Sc.) 1885 SANDEMAN v. SCOTTISH PROPERTY SOCIETY. Lord Watson.

venerabiles domos movere." And it may not be out of place to observe here that, by the civil as well as by the canon law, the "conductor" or "emphyteuta" could always protect himself against forfeiture of his right ob non solutum canonem, and maintain his possession under it, by making prompt payment of all arrears due by him.

In my opinion the remedy which a superior has by virtue of an irritancy implied in terms of 1579, c. 250, or a conventional irritancy of the same import, is a right to annul the charter and infeftment of his feuar, and all that has followed thereon, to the effect of resuming the full beneficial possession of the lands feued, unless the arrears of his feu duty are at once paid to him, either by the feuar himself, or some one deriving such right from the feuar as gives him a legitimate interest to purge. I may refer to the late Mr. Montgomerie Bell's Lectures on Conveyancing (1) as illustrating the opinion entertained by those who were conversant with the practice followed in these matters. He says, "The object of the statute is to give him (i.e., the superior) back the lands in case the vassal shall fail to pay the feu duty, that is, to fulfil the conditions on which he holds them." The appellant would only have been using the remedy competent to an ordinary creditor in a debitum fundi if he had proceeded to adjudge the whole five acres upon which his feu duty is preferably charged for the arrears due to him. In that case he would, after obtaining and recording his decree of adjudication, have entered into possession of the subjects, and would have applied the balance, if any, of the rents and profits remaining after payment of preferable yearly burdens, including his own feu duty of £480, in reduction of his debt of £2088. At the end of ten years, if his debt were not then satisfied, he could have converted his recorded decree of adjudication into an absolute and irredeemable title of property, by taking a decree of declarator of expiry of the legal. Until that decree was pronounced, his right would remain subject to redemption. Now, it humbly appears to me that the legal effect of the statutory or any similar irritancy is simply to give the superior, who is a preferable creditor for a debitum fundi, an absolute right to the lands upon which it is secured, if the debt

(1) Vol. i. p. 585.

be not paid before decree of tinsel, instead of leaving him to follow the remedy which any creditor for a preferable debitum fundi, though not a superior, might have obtained by means of an apprising or adjudication. As Lord Balgray said, in the *Magistrates of Edinburgh* v. *Horsburgh* (1), an action of declarator of tinsel of the feu ob non solutum canonem is "just an irredeemable adjudication of the feu in favour of the superior."

I can discover no satisfactory principle for holding that any of the superior's remedies for the recovery of his cumulo feu duty out of the entirety of the original feu are impaired by the fact of sub-feus having been created, to which he was not a consenting party, and which he has not confirmed. The superior can poind the ground, he can adjudge, he has a first claim on the price of the land, whether arising from voluntary or judicial sales; and that without the least regard to the existence or to the interests of the sub-feuars. The considerations in respect of which these remedies against the land upon which his feu duty is charged are permitted to the superior, seem to me to apply with equal force to his remedy by declarator of irritancy. The sub-feuar is liable to eviction by these means, because the paramount interest of the superior entitles him to attach the land for payment of his feu duties, in preference to the original vassal and all who derive right from him; and I can find no authority for holding that the right of the superior must be subordinated to that of the sub-feuar, when he seeks to adjudge the land irredeemably by means of a declarator of tinsel. The sub-feuar can in all cases protect himself from eviction by paying the superior's preferable debt, and, when he does pay for his own protection, he has a claim of relief pro ratâ against all other owners of the land upon which that debt is charged, as well as against his own immediate superior.

It is said, however, that there is not a single example in the books of a demand being made by a superior for the irritancy of a sub-feu right because of the failure in payment of his immediate vassal. The fact that there has been no judicial decision, or even controversy, upon such a point appears to me to indicate that the law has all along been understood to be settled one way or

(1) 16 May, 1834; 12 Court Sess. Cas. 1st Series, at p. 597.

H. L. (Sc.) 1885

SANDEMAN v. SCOTTISH PROPERTY SOCIETY.

Lord Watson.

another; but I do not agree with the observation of the Lord Justice Clerk that, "We may assume that the absence of precedent implies the absence of right in such a matter" (1). My reasons for rejecting that inference are mainly these,—that the prime superior's feu duty is a real debt preferable to the right of the sub-feuar; and that there is no authority whatever to be found for the proposition that the superior cannot reach the land in the possession of a sub-feuar by means of a declarator of irritancy, although he can do so by poinding or adjudication; whilst, on the other hand, there are expressions of judicial opinion to the effect that the superior's remedies for recovery of a cumulo duty cannot be affected by his vassal dividing the feu, or sub-feuing portions of it; and lastly, that the power of the prime superior to irritate their rights because of the default of his vassal and their author appears to me to have been conceded, without dispute, by sub-feuars.

In *Wemyss* v. *Thomson* (2), a superior feued out a block of building ground, prohibiting subinfeudation, and stipulating that his vassal's disponees should hold of himself, but without coming under an obligation to allocate the feu duty. The vassal built houses and conveyed them to different proprietors, with a declaration that each should hold of his superior for a yearly sum, being a proportion of his original feu duty. Upon these proprietors taking out charters, the superior inserted in each an obligation for payment of the whole feu duty. To this the disponees objected, but the Court held that the superior had the right to do so, but that they were entitled to have a clause inserted in their feu charters, binding the superior to grant an assignation, at their expense, to the effect of enabling them to recover from their co-feuars whatever sum might be exacted from them beyond their own just proportion of his cumulo feu duty. Lord Glenlee said (3): "The possessions in question are portions of an entire subject, not separated by any act of the superior; and I can see no solid difference between buildings such as this, and lands. The Crown has the right to claim against any one who has part of

(1) *Sanderson* v. *Stiven*, 10 Court Sess. Cas. 4th Series, at p. 622.

(2) 19 Jan. 1836; 14 Court Sess. Cas. 1st Series, 233.

(3) 14 Court Sess. Cas. 1st Series, at p. 240.

the tenement, who is entitled to recover from his co-vassals; and a subject superior must have the same right."

Again, in *Gilmour* v. *Balfour* (1), a vassal sub-feued various portions of his feu, and thereafter granted two separate heritable securities, covering the whole feu, one of which included all the sub-feus. The only question before the Court related to the proportions in which the heritable creditors, who had entered into possession, ought to pay the cumulo feu duty prestable to the superior. In dealing with that question Lord Jeffrey said (2): "The right of the superior is not here in question, but is admitted to be catholic, universal, and overruling against all the present parties. He takes no cognizance of any division which may have been made of the subject for which he has stipulated a cumulo feu duty, and never can be affected by any such division. He can come for the whole upon the holder of the smallest portion."

The subsequent case of *Beveridge* v. *Moffat* (3) appears to me to have a very important bearing upon the point which your Lordships have to decide. There the vassal who held, for a reddendo of £120, sub-feued the whole property to different individuals for feu duties amounting in the aggregate to the original reddendo, and thereafter became bankrupt, being, at the time, in arrear to his superior to the extent of six years' feu duties. With the view of saving their own and the other sub-feus from threatened forfeiture, two of the sub-feuers paid up these arrears to the prime superior, and also purchased the mid-superiority from the trustee in the vassal's sequestration; and the action was brought by them against Beveridge, who had acquired one of the sub-feus, for the purpose of compelling him to contribute his proportion along with the other sub-feuers. The case was ultimately decided on the ground that Beveridge had acquiesced in and adopted the steps taken by the sub-feuars for the common behoof; but it must be observed that whilst Beveridge denied acquiescence and disputed his personal responsibility, he did not dispute that his

(1) Jan. 22, 1839; 1 Court Sess. Cas. 2nd Series. 403.

(2) 1 Court Sess. Cas. 2nd Series, at p. 405.

(3) June 9, 1842; 4 Court Sess. Cas. 2nd Series, 1381.

H. L. (Sc.) 1885 SANDEMAN v. SCOTTISH PROPERTY SOCIETY. Lord Watson.

sub-feu might have been evicted by the prime superior or his assignees. The Lord Ordinary (Cuninghame), in his note says (1): "When the prime superior's claim against the sub-feuars and their properties emerged in 1829, on the bankruptcy of Grant (the mid-superior) it was clearly their interest to save their properties from forfeiture. The prime superior could undoubtedly have instituted an action of irritancy ob non solutum canonem against all the sub-feuars, without regard to their settlement with the mid-superior; and Moffat and Grant (sub-feuars), as assignees of Gavin (the prime superior), could have taken a similar step. But the defender superseded such a process by specially agreeing to pay his proportion of the arrears." Lord Medwyn also speaks of the steps taken by the sub-feuars to satisfy the prime superior's claim for arrears as "agreed upon to save the forfeiture of their feu rights." None of the other judges refer to the subject of forfeiture; but it is hardly conceivable that they would have permitted the language of the Lord Ordinary to pass without observation, if they had thought that it would have been contrary to law and practice to permit the superior to annul these sub-feu rights; and they all deal with the arrangements for payment of the arrears due to the prime superior as having been prudently made for the general behoof.

The principle which runs through these authorities is, that neither the security of the superior for his cumulo feu duty, nor his remedies for its recovery, can be impaired by the act of his vassal. That principle can, of course, have no application in cases where the superior himself has either been a consenting party to sub-infeudations by his vassal, or has subsequently confirmed the base rights of the sub-feuars. He cannot repudiate his own act, although he is not affected by the mere acts of his vassal. According to Erskine (2) the confirmation of a base right by the prime superior effectually secures the sub-vassal against all casualties "which entirely exhaust the property," although it cannot be explained into a renunciation of those casualties which infer only a temporary right to the rents. The appellant's counsel did not argue, and I do not think it could be

(1) 4 Court Sess. Cas. 2nd Series, at p. 1385. (2) Ersk. Inst. 2. 7. 8.

reasonably maintained, that a superior who has been a party to or has confirmed a charter of sub-feu granted by his vassal is not thereby barred, personali exceptione, from annulling the sub-feuar's right by declarator of tinsel, in respect of his immediate vassal's failure to pay his reddendo for two years together.

The majority of the learned judges who decided this case in the Inner House, seem to have been of opinion that the appellant must be held to have consented to the sub-feu rights now vested in the respondents. Although a plea to that effect is stated for the respondents, in their defences, and also in their cases, it was not very seriously insisted on by their counsel; and I do not think any of your Lordships were of opinion that it was, in the circumstances of this case, maintainable. All that the appellant did was to stipulate, in his original charter to Stiven and Gibson, that certain conditions therein expressed should constitute real burdens, not only upon their right, but upon the rights of their "assignees," and should, for that purpose, be inserted or validly referred to in all "transmissions or investitures of the piece of ground hereby disponed." The respondents' feu rights, to which the appellant was not, in any sense, a party, derive their validity, not from any consent of his, but from the law; and the Act of 1874 (37 & 38 Vict. c. 94, s. 4), which confers upon the respondents certain privileges as to the completion of their title, expressly reserves to all superiors the rights and remedies previously competent to them for recovering their feu duties, and for irritating the feu ob non solutum canonem.

The opinions of the learned judges who, in this case and in *Cassels* v. *Lamb* (1), favour the contention of the respondents, are to a great extent rested upon the supposed analogy of irritancy ob non solutum canonem to forfeiture of a feu for treason, and to the superior's claim for a year's rent, by way of composition for the entry of a singular successor. The authorities in regard to forfeiture for treason, which is not purgeable, when carefully examined, do not appear to me to yield any inference favourable to the respondents; and, in my opinion, the principle upon which a reddendo, fairly representing the value of a sub-feu at the time when it was given off, was held in *Cockburn Ross* v. *Heriot's*

(1) 12 Court Sess. Cas. 4th Series, 722.

H. L. (Sc.) 1885 SANDEMAN v. SCOTTISH PROPERTY SOCIETY. Lord Watson.

Hospital (1), to be the rent at which the land has been "set," for the purpose of estimating the year's maill payable to the superior, in terms of 1469, chapter 12, has no bearing whatever upon the question now before the House. But it is quite unnecessary to explain in detail the considerations which have led me to that conclusion, because these are fully expressed in the opinions delivered by Lord Rutherfurd Clark in this case (2), and *Cassels* v. *Lamb* (3), and by Lords Kinnear and McLaren in *Cassels* v. *Lamb*.

I desire to say, however, that I have not been able to appreciate certain difficulties, said to arise from feudal principle, which were urged against the respondents. Had the appellant been barred, personali exceptione, from resorting to any remedy which would have the effect of exhausting the property of the respondents, he would have been bound, as regards their sub-feus, to limit the conclusions of his action to his vassal's mid-superiorities. The effect of that would have been that, the mid-superiorities being irritated, or, in other words, adjudged irredeemably to the appellant, he could either have held them as separate estates, or consolidated them with his own superiority; and in either case, he could only have demanded from the respondents the feu duties stipulated in their charters. Such a result does not appear to me to do violence to any feudal principle, and I apprehend that precisely the same result would have followed if it could have been shewn that the respondents' sub-feu rights are by law as effectually protected against his right of irritancy as if he had expressly consented to or confirmed them.

I am accordingly of opinion that the interlocutors appealed from ought to be reversed and the case remitted to the Court of Session, with a declaration that the appellant is entitled to have decree in terms of the conclusions of his summons against the respondents. In my opinion, the respondents ought to pay to the appellant the expenses incurred by him in the Court below since the 10th of March, 1882, as well as his costs of this appeal, and I move accordingly.

(1) 6 June, 1815; 18 Fac. Dec. 393, Paton, 640.

(2) 10 Court Sess. Cas. 4th Series, at p. 629.

(3) 12 Court Sess. Cas. 4th Series, 722.

EARL OF SELBORNE :—

The conclusion at which I had arrived at the end of the arguments in this case was the same with that of my noble and learned friend; and I agree with the reasons for the judgment which has just been delivered.

On principle, and in the absence of positive law or authority to the contrary, it would have appeared to me to follow, from the very nature of a subordinate right like the feu in question, that it must be subject to the conditions on which the principal feu, out of which it is derived, was created. There is no positive law, and no authority, to the contrary.

Nor does it appear to me that any real hardship or injustice to the sub-feuar results from this doctrine. He took his title, with notice of the terms on which the principal feu was created: and he might have redeemed, if he had thought fit to do so, by payment of the arrear of feu duties due to the superior. If he does not consider this for his interest, that cannot be a reason why the superior should suffer.

LORD BLACKBURN :—

I listened during the learned arguments upon a subject with which I am not quite familiar, and I have read with great attention the judgments on the opposite sides, and I agree in the motion which has been made by the noble and learned Lord (Lord Watson).

LORD FITZGERALD :—

The very able and exhaustive reasons of my noble and learned friend (Lord Watson) for reversing the interlocutors of the Court of Session, are to me full and convincing, and I do not propose to add a word save to express my satisfaction that the conclusion arrived at in this action of declarator of irritancy "ob non solutum canonem" indicates, that in this respect the principles of Scotch law are in substantial accord with the law of England. For example, if in England or Ireland a grant had been made in perpetuity reserving a rent with condition of re-entry on non-payment, an action of ejectment at common law might be maintained on non-payment for condition broken and be followed by

H. L. (Sc.) 1885

SANDEMAN v. SCOTTISH PROPERTY SOCIETY.

results substantially similar to those in the present case. I concur in the judgment proposed.

Ordered and *adjudged*:—That the said interlocutor of the Lord Ordinary of Scotland, of the 25th of July, 1882, in so far as the same is appealed from, and also the whole interlocutors of the Lords of Session there of the Second Division appealed from, dated the 21st of February and the 1st of March, 1883, be reversed: And it is *Ordered*, That the expenses decerned for under the said interlocutors of the 1st of March, 1883, hereby reversed, or so much thereof as have been paid under the same, be refunded or repaid to the appellant by the parties respectively in whose favour the same were decerned for, and to whom the same were paid: And it is further *Ordered*, That the cause be, and the same is hereby remitted to the Court of Session with the declaration that the appellant is entitled to have decree in terms of the whole conclusions of his summons for declarator and removing, against all the parties therein called as defenders; and that the said Court of Session do give such directions as are necessary for giving effect to the order hereby made for refunding or paying to the appellant the expenses foresaid: And it is *Ordered*, that the respondents the said Scottish Property Investment Company Building Society and the liquidators thereof, and the said David Crabb, do pay to the appellant the expenses of process incurred by him in the Court of Session from and after the date of the Lord Ordinary's interlocutor of the 10th of March, 1882: And it is further *Ordered*, That the said Scottish Property Investment Company Building Society and the liquidators thereof, and the said David Crabb, do pay or cause to be paid to the said appellant the costs incurred in respect of the said appeal.

Lords' Journals, 29th June, 1884.

Agents for appellant: *Neish & Howell, for Henderson & Clark, W.S., Edinburgh.*

Agents for respondents (the Scottish Property Society and liquidator): *Faithfull & Owen, for Davidson & Syme; W.S., Edinburgh.*

Solicitors for respondent David Crabb: *Keeping & Co.*

[HOUSE OF LORDS.]

THE NORTH BRITISH RAILWAY COMPANY . . . . . } APPELLANTS;

AND

THE LORD PROVOST OF PERTH AND ANOTHER . . . . . } RESPONDENTS.

H. L. (Sc.) 1885 *March* 27.

Railway—Broken Bridge in navigable River—Removal of Débris to Satisfaction of Board of Trade, Meaning of—Construction of Statute.

The North British Railway (New Tay Bridge) Act, 1881, gave the North British Railway authority to erect a new bridge over the Tay a little higher up the river than one blown down on 28th December, 1879. Sect. 21 of this Act provided, "The company shall abandon and cause to be disused as a railway so much of the North British Railway as lies between the respective points of junction therewith of railway No. 1 and railway No. 2; and shall remove the ruins and débris of the old bridge, and all obstructions interfering with the navigation caused by the old bridge, to the satisfaction of the Board of Trade." The magistrates of Perth, whose jurisdiction extends down the river to within about three miles of the old bridge, raised an action for declarator and implement:—

Held, (1) that the special Act imposed an absolute obligation to remove the whole ruins and débris of the old bridge; and sect. 21 did not give the Board of Trade a discretionary power to dispense with the performance of any part of this obligation; and it followed that the respondents had an interest to obtain a declarator as to the extent of the obligation; but (2), dissenting from the judgment of the Court below, the obligation did not become immediately prestable; and (3) the import of the expression "to the satisfaction of the Board of Trade" was, that though not bound to submit their plans of removal, including the time and manner, yet, as, a matter of prudence, the company ought to do so; (4) that in the circumstances it would be inexpedient, though hardly incompetent, to do more now than simply ordain the company to remove the whole ruins and débris in terms of sect. 21, for to order the removal "forthwith" might unduly hamper the discretion of the Board of Trade; and if the company were guilty of undue delay in applying to the Board of Trade; or if they should proceed at their own hand so as to cause obstruction to navigation; or if after obtaining the sanction of the Board of Trade to some scheme of removal, they failed to properly execute it, or any conditions attached, the respondents, on application to the Court, had an effective remedy.

APPEAL from the Second Division of the Court of Session, Scotland.

H. L. (Sc.) 1885

NORTH BRITISH RAILWAY CO. v. PROVOST OF PERTH.

In 1870 the North British Railway Company, the appellants, obtained parliamentary powers (1) to construct a railway with a bridge for carrying the railway over the River or Firth of Tay near Dundee. The magistrates, &c., of the royal burgh of Perth, the appellants, whose jurisdiction in the River Tay extends down to within about three miles of the town of Dundee (2) had opposed the above-mentioned bill, and as the result of negotiations a clause was inserted in the bill empowering the Board of Trade to fix and regulate the height and width of the openings and the position of the piers in the intended bridge. The appellants also bound themselves to pay to the respondents a sum of £500 in respect of the obstruction of the river arising during the construction of the bridge, and also to make certain future yearly payments.

The bridge was opened in 1878. On the 28th of December, 1879, a considerable portion of the bridge fell. In 1881 the appellants introduced a bill (3) in Parliament, which became law on the 18th of July, 1881. In this bill the appellants asked for powers to make and maintain certain railways, and in particular a railway to be constructed upon a viaduct across the River or Firth of Tay a little higher up the river than the site of the old bridge. As the result of an agreement between the parties, the following clause, inter alia, was inserted:—

Sect. 21:—"The company shall abandon and cause to be disused as a railway so much of the North British Railway as lies between the respective points of junction therewith of railway No. 1 and railway No. 2; and shall remove the ruins and débris of the old bridge, and all obstructions interfering with the navigation caused by the old bridge, to the satisfaction of the Board of Trade; and the company may appropriate and use for the purposes of their undertaking all or so much of the site of the railway so abandoned as lies above low-water mark, and shall within ten years from the passing of this Act, and subject to the provisions of the Railways Clauses Consolidation (Scotland) Act, 1845, with respect to the sale of land not required for the purposes of the undertaking, sell all such parts of the site of the railway abandoned above low-water mark as shall not be required for those purposes. (4)"

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(1) The North British Railway and Tay Bridge Railway Act, 1870.

(2) See charter granted by King James, and dated 15th Nov. 1600, and 19 & 20 Vict. c. 138, and Acts therein recited.

(3) The North British Railway (New Tay Viaduct) Act, 1881.

(4) The other material sections were:—

Sect. 12: Which enforced a heavy penalty against the railway if they

The portion of the old bridge which fell was in or near the centre of the river, and the landward portions at either end are still standing. The piers which supported the part which fell are also still standing. The piers are supported by large cylinders about 30 feet in diameter at the level of about 5 feet below low-water mark. Above that level the piers are hexagonal, and measure 16 feet from north to south and 30 feet from east to west. The centre line of the new bridge is proposed to be 60 feet to the westwards of the centre line of the old bridge, and the piers of the new bridge are proposed to be 40 feet long from east to west and 16 feet wide from north to south. If the cylinders and piers of the old bridge are left standing the length of the old and new piers, together with the spans between them, will be 99 feet from east to west. It is proposed by the appellants that the new piers shall be placed so that the old and new piers shall be at right angles to the longitudinal axis or line of the new bridge.

Before the operations on the new bridge were begun, the appellants' engineer wrote to the Board of Trade in reference to clause 21, submitting a drawing shewing the parts of the old bridge which the appellants proposed to remove, and also the parts they proposed to leave in the river. The engineer explained that as regards the thirteen largest spans of the old bridge the piers were formed of wrought-iron cylinders sunk with the bed of the river and filled with concrete, cutwaters of brick, &c., being built on the cylinders, and that while the cutwaters could be removed the removal of the cylinders would require some heavy explosive, and would endanger the foundation of the new bridge. He proposed, therefore, to allow the cylinders to remain, and also certain of the cutwaters. The Board of Trade submitted this letter to the respondents, who did not agree to the proposal. The Board

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had not completed their new works within the time limited in the Act, namely, five years.

Sect. 14. "If the railways by this Act authorized and described on the deposited plans are not completed within five years from the passing of this Act then on the expiration of that period the powers by this Act granted to the company for making and completing the said railways or otherwise in relation thereto shall cease to be exercised except as to so much thereof as is then completed."

H. L. (Sc.) 1885 NORTH BRITISH RAILWAY CO. v. PROVOST OF PERTH.

of Trade thereupon informed the appellants that it appeared to them that sect. 21 did not give the Board power to dispense with the removal of the ruins and débris of the old bridge. Subsequently the appellants wrote to the Board of Trade undertaking that if after the new bridge was completed the navigation was injuriously affected by any of the piers of the old bridge which might be left standing, the appellants would remove the same. They also undertook to extend the clause obliging them to tow all laden vessels of not less than forty tons weight a mile above and a mile below the bridge to all unladen vessels of a like tonnage. The Board of Trade approved of the plans proposed by the appellants, and thereafter the new bridge was commenced and is still in course of erection (1). The respondents then

(1) The correspondence material to the question raised was as follows:—

On the 6th of December, 1881, the assistant secretary, Board of Trade, wrote the appellants' engineer:

"Sir,—Referring to your letter of the 28th July last, upon the subject of the removal of the ruins of the Tay Bridge, and transmitting a plan shewing the portions to be removed and those proposed to be left standing, I am directed by the Board of Trade to acquaint you that, upon a very careful consideration of all the circumstances of the case, it appears to them, as at present advised, that sect. 21 of the North British Railway (New Tay Viaduct) Act, 1881, does not give them any power to dispense with the removal of the ruins and débris of the old bridge. I am accordingly to return to you for amendment the plan enclosed in your letter. The Dundee Harbour Trustees and the town clerk of Perth have been informed accordingly."

The engineer replied as follows:—

"Sir,—With reference to your letter of the 6th December, I have now the honour to submit a complete elevation and plan of the New Tay Viaduct, and to request, on behalf of the North British Railway Company, the sanction of the Board of Trade thereto.

"As a question has been raised with regard to the piers of the old bridge, I ought to state that in carrying out the new work it is essential to have the use of the old bridge, and the parliamentary estimate was formed on that basis, and the contract has also been let on that condition; but, of course, the Board of Trade's approval of the plan now submitted will be without prejudice to the provisions of the Act."

On the 12th of January, 1882, the assistant secretary, Harbour Department, Board of Trade, wrote to the general manager of the North British Railway Company, which, after referring to the purchase by the company of the tidal site of the new bridge and other matters, continued:—

"Upon these requirements being satisfied, the Board of Trade will cause their formal approval to be inscribed on the plans, without prejudice to the provisions of sect. 21 of the Act of 1881, one set of which will be retained in the records of this office, and the other returned to the engineer as the

raised this action against the appellants for decree, substantially, as follows, that the appellants are bound to remove the ruins and débris of the bridge and railway over the River Tay erected in virtue of the Act of 1870, and particularly to remove the piers, cylinders, cutwaters, and all other portions of the said bridge and railway situated in the channel of the river and the whole ruins and débris connected therewith, and all obstructions interfering with the navigation of the river caused by the said bridge, and the appellants should be decerned to remove the ruins and débris of the said bridge and railway with all piers, cylinders, cutwaters, and other portions thereof, and all obstructions to the free and uninterrupted navigation of the said river caused by the bridge, and that within such period as should be appointed and at sight and to the satisfaction of the Board of Trade; and failing the appellants doing so within such time the respondents ought to be empowered forthwith to remove the same at the sight and satisfaction to the Board of Trade at the expense of the appellants.

The material plea in law for the respondents was:—

In respect the said ruins and débris of the old bridge form an interference with and obstruction to the free navigation of the river Tay, the pursuers, as representing the corporation of the city of Perth, and as the conservators of the river Tay, are entitled to decree against the defenders, ordaining them to remove the said obstructions to the navigation thereof.

Pleas in law for the appellants were, inter alia:—

The pursuers have not set forth and do not possess sufficient title or interest to sue the present action.

The Board of Trade being satisfied with the defenders' actings in the matters alleged, the defenders should be assoilzied.

The action is premature, and ought to be dismissed in respect (1) the portions of the old bridge still remaining are useful for the construction of the new bridge, and are in fact used in connection therewith, and especially are being so used as to diminish the interference with the river which would inevitably arise from the construction of the new bridge; (2) the defenders, if bound to remove

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authority of the company, so far as the interests of navigation are concerned, for proceeding with the works without waiting for the formal completion of the disposition."

On the 16th of January, 1882, the general manager wrote:—

"As the requirements indicated by the Board of Trade, precedent to their approval of the plans, have now been satisfied, may I express the hope that the approval of the plans will be forthwith given, always of course without prejudice to the provisions of sect. 21 of the Act of 1881."

H. L. (Sc.) 1885

NORTH BRITISH RAILWAY CO. v. PROVOST OF PERTH.

the portions of the bridge still standing, are entitled to do so at any time before the 18th of July, 1886, that may be most suitable for them.

The Lord Ordinary (1), on the 19th of December, 1883, pronounced an interlocutor by which he decerned in terms of the first conclusions of the summons, and ordained the appellants forthwith to remove the ruins and débris of the bridge and railway, &c., erected in virtue of the Act of 1870, with all the piers, cylinders, cutwaters, and other portions thereof, and all obstructions to the free and uninterrupted navigation of the said river caused by the said bridge to the satisfaction of the Board of Trade.

On the 22nd of May, 1884, the Second Division of the Court of Session (dissenting Lord Young) pronounced the following interlocutor:—

Recal the Lord Ordinary's interlocutor and declare that the defenders are bound to remove the ruins and débris of the bridge and railway over the River or Firth of Tay . . . with all the piers, cylinders, cutwaters, and other portions thereof, and all obstructions to the free and uninterrupted navigation of the River Tay, caused by the said bridge, and that to the satisfaction of the Board of Trade: Decern and ordain the defenders forthwith to remove the piers and cylinders of the said bridge which are not connected by a continuous railway from either side of the said river or firth, and all the cutwaters and other works erected for the protection of, or in connection with, such piers or cylinders, and all the ruins or debris of the said bridge between the points at which the said railway, proceeding continuously from either side of the said river or firth ends, and all obstructions to the free and uninterrupted navigation of the said river or firth between the said points, all to the satisfaction of the Board of Trade: Find the defenders liable in the expenses hitherto incurred in the cause, and remit to the auditor to tax the same and to report (2).

On the 11th of June, 1884, the Second Division pronounced an interlocutor approving of the auditors' report on the respondents' account of expenses, and ordering the appellants to make payment of the same.

On appeal,

March 10, 1885. *The Lord Advocate* (*Balfour*, Q.C.), and *The Solicitor General for Scotland* (*Asher*, Q.C.), for the appellants:—

The fair reading of sect. 21 of the Act of 1881 is not to impose an absolute obligation on the appellants, but as only rendering them subject to the Board of Trade, who are to decide as to the manner and time of removing the ruins. No doubt the town of

(1) Lord Adam. (2) 11 Court Sess. Cas. 4th Series, 827.

Perth had an interest in fact, but they maintained that to the Board of Trade, a public body, was confided by the legislature with the discretion in the matter, and it so became a question of general navigation. That excluded the town of Perth on its private right attempting to enforce the obligation. If an appeal to the Courts of Law were allowed, then the reference to the Board of Trade became practically meaningless.

Assuming the obligation is enforceable at the respondents' instance, then it was premature to ask them to remove.

Davey, Q.C., and *J. P. B. Robertson*, for the respondents.

They were relieved by the House from arguing that the respondents had a locus standi to come into court.

The question was reduced to one of construction. The Board of Trade was made the referee that the works to be erected were done properly, and that the piers, &c., to be removed were removed to their satisfaction. The Board of Trade had to inspect and give a certificate which the Court could not overrule unless it had been given either through fraud or negligence. But if the work was not done the Board of Trade could not do it, nor had the Board of Trade any power as to extension of time. The true meaning of sect. 21 was that taken by the Lord Ordinary and the Inner House (1), that there was an obligation immediately performable.

The Lord Advocate, in reply.

LORD WATSON :—

I am of opinion that their special Act of 1881 imposes upon the appellant company an absolute obligation to remove the whole ruins and débris of the old Tay Bridge. Upon that point the provisions of sect. 21 are explicit; and I can find nothing in the words "to the satisfaction of the Board of Trade," or in the context, calculated to suggest that the legislature intended to confer upon the Board a discretionary power to dispense, either directly or indirectly, with the performance of any part of that obligation. So far I agree with the Lord Ordinary and with the majority of the judges of the Second Division, and it follows that the respon-

(1) 11 Court Sess. Cas. 4th Series, 827.

H. L. (Sc.) 1885 NORTH BRITISH RAILWAY CO. v. PROVOST OF PERTH. Lord Watson.

dents have a clear interest and consequent right to obtain a decree declaring and affirming the character and extent of the statutory obligation incumbent on the company. The Lord Ordinary decerned in terms of the declaratory conclusion of the summons, a form of decree which I prefer to that which was substituted for it in the interlocutor of the Inner House. The latter omits the adjective "whole," which is of the very essence of the conclusion, and adds to it the words "and that to the satisfaction of the Board of Trade." The addition appears to me to be inexpedient, because it consists of statutory words which are not necessary to the accurate expression of the proposition sought to be affirmed; and also because the true import of these words is matter of serious controversy.

The remaining points in this appeal depend upon the construction which ought to be put upon the words "to the satisfaction of the Board of Trade," as occurring in sect. 21. It is the contention of the respondents that these words do not relate either to the time or manner of removing the ruins of the old bridge, and that they commit to the Board of Trade no duty beyond that of expressing satisfaction or dissatisfaction with the result, after the company's operations for the removal have been completed. The company, on the other hand, maintain that not only the result, but the time and manner of executing the work of removal, as well as the extent to which that work ought to be carried, have all been left by the legislature to the judgment of the Board.

The Lord Ordinary, and three of the learned judges of the Second Division, were of opinion that, no time being mentioned in the Act, the obligation to commence and complete the work of removal became immediately prestable. The Lord Ordinary accordingly ordained the company "forthwith" to remove the ruins and débris of the old bridge to the satisfaction of the Board of Trade. The Second Division varied that part of his interlocutor, to the effect of permitting the company to use certain portions of the old bridge, which are still available for the carriage of materials, in connection with the construction of the new bridge.

If I were called upon to determine, with no other aid than the terms of the Act itself, within what periods, respectively, after its date, the company were bound to commence and complete their

operations for removal of the old bridge, I should have great difficulty in forming any conclusion satisfactory to my own mind. It is not, in my opinion, matter of necessary inference, from its provisions, that the company were to begin at once, or that they were to finish the removal of the old before commencing the erection of the new bridge. In these circumstances I should have been inclined to hold that the onus was on the respondents to shew that there had been undue delay on the part of the company, and not that the company were bound to carry out the work of removal at once, unless they could excuse themselves on reasonable grounds. At all events, I do not think a Court of Law could pronounce a satisfactory order, in regard to the limits of time within which the work ought to be begun and completed, without the assistance of engineering skill. But, in the view which I take of the case, it is not necessary to decide any of these questions at present.

I shall now endeavour to state what I conceive to be the true import and effect of the expression "to the satisfaction of the Board of Trade." I do not think it imposes a positive obligation upon the company to make an application to the Board before they proceed to remove the old bridge. On the contrary, it appears to me that the company might, if they chose, begin and finish the work of removal without first ascertaining the views of the Board. In that case, I doubt whether the Board could actively interfere with their operations unless these were either so planned or so conducted as to cause unnecessary and avoidable obstruction to the navigation of the Tay; but the company would run the risk of the Board's disapproval of the result of these operations, which might involve further, and, possibly, costly operations. It seems to me that it would be at least a prudent course for the company to submit their scheme for the removal of the old bridge, including the proposed time and manner of its execution, to the Board of Trade for its consideration. If the scheme submitted met with the deliberate approval of the Board, I should think it would be exceedingly difficult to satisfy any Court that, in carrying it into effect, the company were either unreasonably delaying to execute the operations directed by the Act, or executing them in a manner injurious to navigation generally or to the interests represented by the respon-

H. L. (Sc.)
1885
NORTH BRITISH RAILWAY CO. v. PROVOST OF PERTH.
Lord Watson.

dents. It is true that according to a very strict interpretation of the words of sect. 21, the function thereby entrusted to the Board of Trade might be confined to an examination of the alveus of the Tay after the work of removal is finished, and an expression of opinion as to its having been done satisfactorily or not. But, having in view the fact that the Board is a department of State, charged with the interests of navigation, and so entitled, irrespective of the provisions of the Tay Bridge Act of 1881, to compel performance by the company of their statutory obligation, and to prevent any unnecessary obstruction to navigation during its performance, I cannot doubt that the legislature expected and intended that the Board should give all parties interested the benefit of its advice, and should exercise, if necessary, some control over the operations of the company. I need hardly add that I see no reason whatever to doubt that the Board is willing and ready to act upon that footing.

Hitherto the Board has not been approached by the appellant company, except for the purpose of obtaining permission to leave part of their statutory obligation unperformed. In preferring that request, the company obviously had in view the possibility of their ultimately obtaining a favourable judgment upon the main question raised in this action. The Board, however, declined to act on the assumption that it had power to dispense with the removal of any part of the ruins and débris, and in giving its sanction to plans for the erection of a new bridge has, with great propriety, added the proviso that such sanction shall be without prejudice to the questions arising in this appeal.

In these circumstances, whilst I am not prepared to say that it would be altogether incompetent, I am of opinion that it would be inexpedient, to do more at present than to ordain the company to remove the whole ruins and débris of the old bridge in terms of sect. 21 of the Act. The better course, in my opinion, would be, merely to pronounce decree of declarator, and, quoad ultra, to continue the cause. The interests of the respondents cannot suffer from the adoption of that course. A decree ordaining, in general terms, the removal of the ruins, in terms of the Act, would be of very little avail without the word "forthwith," which I do not think they are, in present circumstances, entitled to have inserted, because it might unduly fetter the discretion of

the Board of Trade. If the company should fail or unduly delay to apply to the Board of Trade, or if they should proceed to execute the work at their own hand, so as to cause obstruction to navigation, or if they should, after obtaining the sanction of the Board to some scheme of removal, fail to execute it, or in its execution fail to observe conditions attached to such sanction, then I conceive the respondents might upon application to the Court below, obtain an effective remedy in this action.

I therefore think the respondents ought to have decree in terms of the first conclusion of their summons, and that quoad ultra the case ought to be continued. I also think that substantial success being with the respondents, they ought to have their costs in this House.

LORD FITZGERALD:—

I entirely concur, and have nothing to add.

EARL OF SELBORNE, L.C.:—

I also entirely agree in the opinion that has just been delivered.

Interlocutor of the Second Division of the 22*nd of May*, 1884, *varied by inserting in the first and declaratory decerniture the word "whole" before the words "ruins and débris," and by deleting the words "and that to the satisfaction of the Board of Trade" at the end of said decerniture; and also by deleting the second and mandatory decerniture: and subject to these alterations affirmed.*

Interlocutor of the Second Division of the 11*th of June*, 1884, *also affirmed.*

Appellants ordered to pay to the respondents the costs of this appeal.

Lords' Journals, 27th March, 1885.

Agent for appellants: *W. A. Loch, for W. White-Millar, S.S.C.*

Agents for respondents: *William Robertson & Co., for Irons, Roberts & Lewis, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (E.) 1885 July 24.

WILLIAM RUSSELL . . . . . APPELLANT;

AND

WILLIAM HENRY WATTS AND OTHERS . RESPONDENTS.

Easement—Light—Implied Reservation by Grantor—Notice—Building Scheme—Merger of Lease—Surrender.

By seven simultaneous leases seven plots of land marked respectively A, B, C, D, E, F, and G, and forming together one square block, were demised by the owner to J. with a ground plan on each lease, and with covenants for the erection and maintenance of buildings upon each plot according to certain plans. The leases were granted with a view to the erection upon the whole block of one large edifice, of which the several parts and the internal arrangements were to be connected together for a common use and occupation; so however as to be separable (if desired) into seven separate buildings. J. being in the occupation of the whole, while the buildings were being erected mortgaged C, F, and G, by a sub-lease which recited the building scheme and the original leases of C, F, and G, and contained stipulations for the completion of the buildings on C, F, and G. After the buildings had been substantially completed J. mortgaged E by a deed which recited the lease of E and assigned the buildings thereon, subject to the covenants in the lease, to one who had notice of the general plan of the buildings. J. then mortgaged B. On J.'s bankruptcy the several mortgagees obtained foreclosure decrees in respect of B, C, and E respectively:—

Held, reversing the decision of the Court of Appeal and restoring the decision of Bacon V.-C., Lord Blackburn dissenting, that though there was no express reservation of the right to light, yet looking at the plans, the covenants in the original leases, and the mortgage deeds, the mortgagees of C and E respectively were by reasonable implication precluded from interfering with the light to the windows in B which looked out upon C and E respectively, and might be restrained accordingly in an action by the mortgagee of B:

Held, also, that the mortgagee of B could maintain such an action, although he had surrendered the lease of B and taken a fresh lease from the original lessor; for—without deciding what effect the merger of the original lease might have—whenever the lease of B came to an end either by surrender, forfeiture, or otherwise, the original lessor would have the same rights to light as the mortgagee would have had if the original lease had subsisted.

Semble, by the Earl of Selborne, that if on a sale and conveyance of land adjoining a house to be built by the vendor, it is mutually agreed that one of the outer walls of that house may stand wholly or partly within the

verge of the land sold and shall have in it particular windows opening upon and overlooking the land sold, and if the house is erected accordingly, the purchaser cannot afterwards build upon the land sold so as to prevent or obstruct the access of light to those windows.

APPEAL by the plaintiff from an order of the Court of Appeal (Cotton and Fry L.JJ., Lindley L.J. dissenting) which reversed an order of Bacon V.C.

The facts are set out at length in the report of the decision below (1), and are also stated in the judgments of the Earl of Selborne and Lord Blackburn.

June 22, 23, 26, 29. *Hemming* Q.C. and *George Williamson* for the appellant:—

The finding of the Court below, so far as it held that the respondents were entitled to exclude the light from the appellant's sixteen windows was wrong. The appellant is entitled to have his house—block B—as an inhabitable house just as it was, or as it was agreed to be, at the date of the mortgage to the Moons, the respondents' predecessors in title. No doubt there was no express reservation of the light of these windows, but from the meaning of the contract almost simultaneously entered into with the several mortgagees, coupled with the surrounding circumstances, such a reservation must be implied. The Moons were aware that Jeffery intended to build one large building capable of subdivision into seven houses. From their deed it clearly appeared that they should use the portion mortgaged to them—if they ever came into possession—so as not to destroy or damage the rest. There was, no doubt, damage which would be caused to block B. by the exclusion of light. Most of the rooms would be rendered useless; in fact, the access of light was a necessity to enable the block to be enjoyed as an inhabitable house. A grantor cannot derogate from his grant; but in the implication of an easement of necessity, the implication of a reservation will be used in favour of the grantor as well as of the grantee: *Pomfret* v. *Ricroft* (2); *Dand* v. *Kingscote* (3); *Pheysey* v. *Vicary* (4). In

(1) 25 Ch. D. 559.
(2) 1 Wms. Saund. (Ed. 1871) p. 569, note 6.
(3) 6 M. & W. 197.
(4) 16 M. & W. 484.

H. L. (E.) 1885 RUSSELL v. WATTS.

Pearson v. *Spencer* (1) although the way had ceased to be a way of necessity the Exchequer Chamber (2) sustained it, upon the construction and effect of the testator's will, taken in connection with the mode in which the premises were enjoyed at the time of the will, because it fell "under that class of implied grants where there is no necessity for the right claimed; but where the tenement is so constructed as that parts of it involve a necessary dependence, in order to its enjoyment in the state it is in when devised, upon the adjoining tenement." The same principle applies whether it be an easement of light, drains, or water.

[THE EARL OF SELBORNE referred to *Ewart* v. *Cochrane* (3).]

And if a man erect a house and build a conduit thereto in another part of the land, and sell the land, reserving the house, yet the conduit shall pass with the house, because it is necessary et quasi appendant to the house: *Nicholas* v. *Chamberlain* (4). In *Palmer* v. *Fletcher* (1663) (5), a case brought for stopping up lights, as here, there were opposite opinions, and that case has been the root of all the subsequent litigation. The question again occurred, but only as a dictum, in *Tenant* v. *Goldwin* (6). But in 1857 it was held that if the owner of two or more adjoining houses sells one of them, the purchaser is subject to the burden of all drains necessarily used for the enjoyment of the other house, although there be no express stipulation for the purpose. And one of the reasons given was, because he purchased the house "such as it is": *Pyer* v. *Carter* (7).

The respondents rely on *Suffield* v. *Brown* (8) and *Wheeldon* v. *Burrows* (9). But the first was admittedly a very extraordinary easement, and the circumstances here are quite distinct from those in the latter. The doctrine that each party were to have the easements as each part assigned stood at the date of the contract was given effect to in *Richards* v. *Rose* (10); and the same

(1) 1 B. & S. 571.
(2) 3 B. & S. 767.
(3) 4 Macq. 117. Dictum by Lord Campbell at p. 122.
(4) Cro. Jac. 121.
(5) 1 Lev. 122.
(6) 6 Mod. 314; 2 Ld. Raym. 1093; 1 Salk. 360 (3rd of Anne).
(7) 1 H. & N. 916.
(8) 4 D. J. & S. 185.
(9) 12 Ch. D. 31.
(10) 9 Ex. 218.

principle was referred to in *Pinnington* v. *Galland* (1). The principle contended for by the appellant appears distinctly in *Swansborough* v. *Coventry* (1832) (2) and *Cotching* v. *Bassett* (3).

[The appellant's counsel were relieved from arguing on the effect of the surrender of the lease until after the respondents were heard.]

Horace Davey Q.C. (with him *O. L. Clare* and *C. Tanner*) for the respondents:—

The respondents claim to obstruct in a lawful manner the light of the plaintiff's windows. The appellant is in occupation of the present walls and window-sashes, and therefore the respondents had no right to injure them; but it was another thing to say the appellant was entitled to the party walls for the purpose of lighting his rooms. As a preliminary point, the respondents submit that the surrender of the original lease of block B determined any implied easement there might be. The appellant derives his present title from the lease of the 8th of January, 1877, but by the surrender the corporation reverted to their old rights; and the corporation had no higher right than can be held to be in them under the lease of 1866 to Jeffery. By that deed the single restriction placed on Jeffery was that he should not depart from the elevation towards the street. And the plans accepted by the corporation refer only to street elevations and not to interior elevations. Therefore, if the corporation could not restrict the respondents, how could they confer that right on the appellant?

[The EARL OF SELBORNE referred to *Toulmin* v. *Steere* (4); and LORD BLACKBURN referred to *Caledonian Railway Company* v. *Sprot* (5).]

The surrender of a partly-expired term and obtaining instead a longer term imposed a greater obligation. And see *Tulk* v. *Moxhay* (6) and *Schreiber* v. *Creed* (7).

On the main point, this is not a question of the respondents'

(1) 9 Ex. 1.
(2) 9 Bing. 305.
(3) 32 Beav. 101.
(4) 3 Mer. 210.
(5) 2 Macq. 449.
(6) 2 Phil. 774.
(7) 10 Sim. 9, 35.

H. L. (E.) 1885 RUSSELL v. WATTS.

right to stop their neighbours' lights, but of the right of the respondents to use their own land. In *Wheeldon* v. *Burrows* (1) it was held that a vendor who intended to restrict his grant must include the restrictions claimed in his contract.

Bowry v. *Pope* (2) was decided on the principle that a grantor cannot derogate from his own grant. See, also, *Palmer* v. *Fletcher* (3). The only exception is in the case of a way of necessity; and also it is said it is an exception to that rule when the grants were contemporaneous: *Swansborough* v. *Coventry* (4). But that was rather an application of the doctrine than an exception, for each grantee gets his right from the grantor, and therefore against each other. *Pyer* v. *Carter* (5) was the only decision favourable to the appellants; but Lord Westbury C. in *Suffield* v. *Brown* (6) refused to recognise it as an authority, and Lord Chelmsford C. in *Crossley & Sons* v. *Lightowler* (7) concurred with Lord Westbury. The remarks of Mellish L.J. in *Walls* v. *Kelson* (8) as to the same case were obiter dicta.

Wheeldon v. *Burrows* (9) decided the question raised here. There Thesiger L.J. stated these propositions:—First, "that on the grant by the owner of a tenement of part of that tenement, as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been, and are at the time of the grant, used by the owners of the entirety for the benefit of the part granted." Second, "if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant." Then his Lordship says, to the latter there are exceptions called ways of necessity, and there may be other exceptions. The principles there laid down are inconsistent with *Pyer* v. *Carter* (5). *Pinnington* v. *Galland* (10) was a case of necessity, and Thesiger L.J. said it in no way disputed the general maxims he had referred to. The same remark applies to *Richards* v.

(1) 12 Ch. D. 31, 49.
(2) 1 Leon. 168.
(3) 1 Lev. 122; 1 Sid. 167, 227.
(4) 9 Bing. 305.
(5) 1 H. & N. 916.
(6) 4 D. J. & S. 185.
(7) Law Rep. 2 Ch. at p. 486.
(8) Law Rep. 6 Ch. at p. 171.
(9) 12 Ch. Div. at p. 49.
(10) 9 Exch. 1, 12.

Rose (1). That was a case of mutual easement of support to each of the houses necessary for their protection and security.

[LORD BLACKBURN referred to *Solomon* v. *Vintners' Company* (1859) (2).]

But, though the easement be apparent, unity of possession will destroy the easement as against the grantor: *Ellis* v. *Manchester Carriage Company* (3); see also *Curriers' Company* v. *Corbett* (4); *Tenant* v. *Goldwin* (5). *Swansborough* v. *Coventry* (6) is not a satisfactory case, and is open to doubt. See per Jessel M.R. in *Allen* v. *Taylor* (7).

In the Court below Lindley L.J. seemed to consider this was not a case of a vendor attempting to derogate from his grant, but a case of apparent cross easements, and his Lordship quoted *Cotching* v. *Bassett* (1862) (8). But the question there was not whether a right existed, but whether the householder's next door neighbour was barred from complaining that the ancient lights were altered because the alteration was within his knowledge. In *Dann* v. *Spurrier* (9) Lord Eldon puts the case of a man's knowingly, though passively, encouraging another to lay out money under an erroneous idea as to titles. But that case does not apply here.

Here there is not a necessity; and there was no contract reserving the light. Such a right cannot be reserved by implication or otherwise than expressly. It was more than probable that Jeffery purposely left the reservation out of Moon's contract, with the object of getting more money on the mortgage.

Hemming Q.C., in reply:—

The respondents say the surrender deprived the appellant of all easements, if any. All that was done was the substitution of one legal term for another, there was no change of beneficial right and occupancy. The corporation approved the plans, and they would have a right to prevent any one building contrary

(1) 9 Exch. 218.
(2) 4 H. & N. 585.
(3) 2 C. P. D. 13.
(4) 2 Dr. & Sm. 355.
(5) 2 Ld. Raym. 1093.
(6) 9 Bing. 305.
(7) 16 Ch. D. at p. 359.
(8) 32 Beav. 101.
(9) 7 Ves. 235.

H. L. (E.) 1885 RUSSELL v. WATTS.

to the plans: Co. Lit. p. 53 a. Also, notwithstanding the surrender, the appellant had an equitable interest to enforce the restrictions against Watts: *Fairclough* v. *Marshall* (1). What was essential to divide Moon's blocks from the other blocks is given in the Moons' mortgage, but it was not conceivable that Jeffery would grant any mortgage, with the knowledge that any of the mortgagees would have the power to destroy the value of any other part of the building. The principle is, that where you have two tenements depending on mutual support, mutual light, or mutual drains it does not matter if the right is actually reserved or not. In the cases of necessity, it has been stated that that means not that there should be an absolute want without which you cannot do; but that the house and land may be used in the same way as at the time of the grant: *Morris* v. *Edginton* (2).

The House took time for consideration.

July 24. EARL OF SELBORNE:—

My Lords, we start in this case with the general rule of English law, that a man cannot be prevented from darkening his neighbours' window lights by any act, otherwise lawful, done on his own land, unless light has been enjoyed through those windows for twenty years; and also with another general rule (exemplified in the case of *Wheeldon* v. *Burrows* (3)) that if a man entitled to a house with windows, however long enjoyed, sells and grants away the adjoining land without any condition, reservation, or other form of contract which can operate restrictively against the grantee, he is not at liberty to derogate from his own grant, so as to prevent any use, otherwise lawful, of the land granted, although the windows of his own house may be darkened thereby. It is manifest, however, that neither of those rules can be invoked in defence of any act contrary to the good faith of a particular contract.

The appellant in this case insists that the respondents cannot consistently with the terms and good faith of the contracts under

(1) 4 Ex. D. 37, at p. 44. (2) 3 Taunt. 24, at p. 31.
(3) 12 Ch. D. 31.

which they derive their title, obstruct certain windows of his, which he and his predecessors in title have enjoyed for a period not amounting to twenty years. Bacon V.C., and Lindley L.J., in the Court of Appeal, thought the appellant right; Cotton L.J. and Fry L.J. thought otherwise, and discharged an injunction against the obstruction of those windows which Bacon V.C. had granted. The present appeal is from their order. I am of the same opinion with the Vice-Chancellor and Lindley L.J., and I think that this appeal ought to be allowed.

The titles of both parties are leasehold under the corporation of Liverpool, and (subject to a question as to the effect of a surrender and renewal upon the appellant's title, which I shall afterwards consider), are both derived from one Jeffery, to whom the corporation granted seven leases of as many parcels of land for seventy-five years, commencing on the 7th of March 1866 (at peppercorn rents), on the 31st of that month. The parcels included in those several leases were all rectangular, and were created by the sub-division, as marked out on a ground plan annexed to each lease, of a square block of land of considerable dimensions, fronting to four different streets in Liverpool. They were distinguished respectively on that plan by the first seven letters of the alphabet. The title to the parcels (A) and (B) is now (subject to the effect of the surrender and renewal already mentioned) vested in the appellant; that to the other five parcels is in the respondents.

Jeffery had been previously the occupier of the whole land thus sub-divided, with buildings thereon, under earlier leases, which (on the destruction of those buildings by fire) he surrendered to the corporation; and he took from them the seven leases of the 31st of March 1866, with a view to the erection, upon the aggregate block of land, of one large edifice to be called "Compton House," of which the several parts and the internal arrangements were to be connected together, with a view to a common use and occupation; so, however, as to be separable (if a separation should afterwards be desired) by closing the communications through the main walls, and by internal partitions in one or two apartments, which (according to the original plan) would extend more or less over several parcels.

H. L. (E.)
1885
RUSSELL
v.
WATTS.
Earl of Selborne.

In each of the seven leases covenants on the part of the lessee were contained, that he or his executors, &c., would within five years, build on the land thereby demised, "according to such plan, as well as to the height and elevation of such building or buildings respectively, *as otherwise*, as should be submitted by him or them to, and should be required and approved of by the council of the borough;" and that he and they should not "alter the height or elevation of any building or buildings when so erected, nor permit the same to be altered without the consent of the council;" and that he and they would "well and sufficiently repair, uphold, and keep all and every the building and buildings to be erected on the said piece of land thereby demised, with their appurtenances, in and with all manner of needful and necessary reparations, when and so often as occasion should require, and the same so repaired, upheld, and kept as aforesaid, at the expiration of the lease should leave and deliver up" to the corporation. A power to re-enter and determine the lease was reserved to the corporation, in the event of the lessee, or his executors, &c., committing or suffering to be committed "any wilful or voluntary waste or destruction in or upon the demised premises or any part thereof," or not repairing according to the covenant. I have not referred to a covenant against the erection of "any court or courts, backhouse or backhouses," on any part of the premises, because it was not noticed in the argument at your Lordships' bar, and it is possible that I may not correctly understand its purpose and effect.

I have said that the ground plan annexed to each lease shewed the whole block of land included in all the seven leases, and the manner in which it was subdivided. The buildings were actually erected according to plans, which in the subsequent mortgage deed of the 30th of June 1866 are recited to have been (and which I have no doubt were) submitted to and approved by the council of the borough, though there is no written approval upon any plan, except those of the elevations of the frontages towards the four streets. But an assent de facto, by the proper officers of the council, without authentication in writing, would, in my opinion, be sufficient; and I do not consider it open to the respondents, who claim under the mortgage deed of the 30th of

June 1866, to deny in this suit the truth of the recitals therein contained.

The plans according to which the buildings were actually erected are in evidence. They are for such a single edifice, capable of subdivision, as was in contemplation when the leases were granted. With that view they provided for the erection of main walls of considerable thickness on all the dividing lines between the several parcels, so that part of each of such walls should stand on each of the two contiguous parcels which it was to divide. The windows to which the present question relates are situate in the upper portions of two of those main-dividing walls, and were themselves included in the original plans, and in the building as first erected. They look out into courts or open spaces, forming parts of the two parcels (C) and (E) now vested in the respondents; and a portion of the wall space in which the openings are made through which those windows receive light, including (as I understand) all or part of the sites of the window-sashes, is included in (C) and (E) respectively. Several of the apartments on the upper floor of the appellant's building on the parcel (B) receive their whole light from those windows. Whether they might by any structural alterations be lighted otherwise seems to me to be immaterial. The courts or spaces into which those lights open were (both in the plans and in the buildings as erected) covered up to and not beyond a certain height, that is up to and not beyond the sills or bases of the lower of those windows, the part above being open to the sky, and admitting the free access of light and air.

Returning to the covenants in the leases, I cannot hold that, as to important structural alterations, by pulling down here or building up there, after the original erection of the buildings, the covenants as to the approval of the plans by the corporation, and as to the maintenance of the buildings in proper repair, are abrogated or dispensed with by the express contract not "to alter the height or elevation" of the buildings without consent. Nor do I think that the word "elevation" (which is coupled with "height") ought to be construed here as relating only to the street-fronts of the buildings. Any important structural alterations of the buildings, after their erection, not authorized by the

H. L. (E.) 1885 RUSSELL v. WATTS. Earl of Selborne.

agreement or consented to by the corporation, would, I conceive, be waste (see Woodfall's Landlord and Tenant, book 2, chap. 12, sect. 5, 10th ed., and the authorities there quoted.)

The present question does not arise between lessor and lessee, but between persons claiming title to different parcels from or under the original lessee. But to determine the questions which arise between those parties the covenants of the original lessee with the corporation and the rights of the corporation under them, are, in my judgment, very material.

I proceed to consider the terms and effect of the underlease by way of mortgage of the parcel (C), bearing date the 30th of June 1866, between Jeffery and Messrs. Moon, who, in 1873, foreclosed that mortgage, and afterwards assigned their title to the respondents.

At the time when this underlease by way of mortgage was executed, the main wall on the dividing line between the parcels (B) and (C) with the openings in it for the windows overlooking the open court or space in (C), had been erected to nearly its full height. The parcels (C), (F), and (G), were all included in this underlease, which was to secure £35,000, advanced, beyond doubt, to enable Jeffery to complete the buildings.

This deed recites the leases of these three parcels, and the covenants therein for the erection of buildings according to plans to be approved by the council of the borough of Liverpool. It contains a power to grant sub-leases, with covenants and conditions conformable, and not repugnant, to those in the principal leases, and other usual powers; which are followed by special recitals, and a mutual agreement, in these words. "And whereas it is the intention of the said James Reddecliffe Jeffery to erect upon the piece of land hereby demised, and upon the said piece of land in the plans drawn in the margin of the hereinbefore recited indenture marked A, B, D, and E, one continuous building or shop, but in such a manner as that if and when occasion shall require the same shall be capable of sub-division into separate buildings. And whereas the plans, elevations, sections, and specifications for the said shop, having been previously approved of by the council of the borough of Liverpool, have been submitted to Mr. John Stewart, the surveyor of the said Edward Moon and Richard Moon,

and the same, so far as they relate to the buildings to be erected on the pieces of land hereby demised, have been approved by such surveyor, and have been authenticated by his signature. Now, therefore, it is hereby agreed and declared between and by the parties to these presents, that subject and without prejudice to the covenants and conditions contained in the said several indentures of lease, the said James Reddecliffe Jeffery, his executors, administrators, or assigns, shall at his or their own expense build and finish on the pieces of land hereby demised such erections, buildings, and conveniences, as shall in all respects correspond to and be in accordance with the plans, elevations, sections, and specifications approved of by the said surveyor as aforesaid, and in particular so as that the buildings to be erected on the pieces of land hereby demised shall be separated from the other portions of the said intended shop and also from each other by such party-walls, and that they shall communicate with the other parts of the said shop by such doorways and passages, and that such doorways and passages shall be capable of being closed with such fireproof or other doors as in the documents last aforesaid, or some of them, are in that behalf respectively set forth and provided." If Jeffery should not do this, the mortgagees might contract to have it done at his expense in such manner as they might think proper, and "either according to the original plans, elevations, sections, and specifications, or in such other manner" as they might think expedient. This power of variation, however, was to be "subject to the covenants contained in the leases;" and, as Jeffery completed the buildings in due time, it never practically arose. Provision was afterwards made to enable the mortgagees, if they should enter into possession, or exercise their powers of leasing or sale, to "close and fasten the doors of the passages" communicating between the mortgaged premises and the buildings on the other lands not included in the mortgage; to "wall or close up with bricks or masonry, and keep closed," all such "doorways and passages," and to do every other act which to them in their discretion might appear necessary or convenient "for the purpose of effecting a complete separation," and "to the intent that the erections and buildings" on the mortgaged land "might be used and enjoyed as two or more separate tenements."

H. L. (E.) 1885 RUSSELL v. WATTS. Earl of Selborne.

The effect of these mutual agreements does not seem to me to admit of any serious doubt. It is "agreed and declared between and by the parties" that Jeffery, at his own expense, shall build and finish on the mortgaged lands "such erections, buildings, and conveniences as shall in all respects correspond to and be in accordance with the plans, elevations, sections, and specifications" approved of by the surveyor of the mortgagees, viz., the plans which are in evidence, according to which the buildings were actually erected. The whole parcel of land marked (C) was included in this mortgage. The main wall dividing (C) from (B), with the openings in that wall for the windows now in question, was, as to a certain portion of its thickness, and of those openings for windows, to be erected on (C). It was, therefore, to that extent, part of the "erections, buildings, and conveniences" which constituted the subject of these mutual agreements. And the whole contract proceeded upon the footing of the performance by Jeffery, and all claiming under him, of the covenants as to building contained, on Jeffery's part, in the original lease of (C). Jeffery and his assigns (mortgagors though they were) were as much entitled as the mortgagees and their assigns to the benefit (so far as they were beneficial to him, or to the property in the adjoining premises (B), which he retained) of those mutual agreements. A mutual agreement is a contract, reciprocally, of each of the parties to it with the other. For either party to insist on the benefit of such an agreement, so far as it is in his favour, is not to derogate from his own grant, but is to require that the other party shall not do so.

What follows, as to the things which might be done for the purpose of separating the buildings on the mortgaged premises from those on the contiguous lands, not only does not authorize, but (as it appears to me) excludes, by reasonable implication, any other interference with the main wall, or the windows therein; for such interference could not be necessary, or in any bonâ fide sense convenient, for that purpose; and the discretion to be exercised is as to the means to be used for that purpose only.

No other question as to this part of the case remains, unless it be this: If on a sale and conveyance of land adjoining a house to be built by the vendor it is mutually agreed that one

of the outer walls of that house may stand (whether wholly or partly I think is immaterial) within the verge of the land sold and shall have in it particular windows opening upon and overlooking the land sold, and if the house is erected accordingly, can the purchaser afterwards build upon the land sold so as to prevent or obstruct the access of light to those windows? I should have been prepared to decide that he could not, even if there had been no such authorities as *Palmer* v. *Fletcher* (1); *Swansborough* v. *Coventry* (2); *Compton* v. *Richards* (3); *Allen* v. *Taylor*. (4) But those authorities appear to me to be in point.

The cases decided upon covenants between vendors and purchasers as to general plans of building (such as *Whatman* v. *Gibson* (5); *Coles* v. *Sims* (6); *Child* v. *Douglas* (7)), have necessarily turned upon their own particular circumstances. Those circumstances differ from the present too much to make them directly in point; but the principle which pervades them seems to me to be applicable when (as here) the parties have a common leasehold title originating in simultaneous, though subdivided contracts, which provided for buildings to be erected according to a definite plan, affecting, under each lease, more than the particular parcel of land included in it, and when all are bound, without qualification, by the terms of the agreements between the original lessee and the lessors.

The appellant's case is less strong as to the windows which overlook the open space or land in the parcel (E) than it is as to those which overlook the parcel (C), but as to these also I have arrived at the same practical result. The respondents' title to that parcel is by assignment from one Duckworth, who was assignee by way of mortgage from Jeffery of the original lease, and who obtained a foreclosure absolute of that mortgage. Duckworth's mortgage was dated the 20th of September 1866, at which time the buildings had been wholly or substantially completed. It did not, under those circumstances, contain any special recitals or agreements, like those in the mortgage to the Moons.

(1) 1 Lev. 122.
(2) 9 Bing. 305.
(3) 1 Price, 27.
(4) 16 Ch. D. 355.
(5) 9 Sim. 196.
(6) Kay, 56.
(7) Kay, 560.

H. L. (E.) 1885 RUSSELL v. WATTS. Earl of Selborne.

But it recited the lease from the corporation to Jeffery, and it assigned the buildings "then standing and being, or in course of erection," upon the land, subject to the observance and performance of the covenants and agreements in that lease. Duckworth thus became lessee, by assignment, under the corporation of the land and buildings in statu quo, with notice (as from the facts I cannot but infer) of the general plan on which they had been erected, on the footing of which all Jeffery's expenditure had been made, and in which both the corporation, as lessors of the whole, and Jeffery as lessee of the premises demised by the other leases, were interested. If the respondents, claiming under Duckworth, could be regarded as grantees of Jeffery free from all restriction, it would seem to follow, not merely that they might obstruct the appellant's windows by building close to them, but that they might fill up with masonry the openings for those windows in the main wall, or even remove that wall itself up to the actual line of division between the parcels (B) and (E). I do not think that any authority obliges your Lordships to hold that, having regard to the nature and terms of the contracts between the corporation and the lessee, and between the lessee and his mortgagee, the respondents would be entitled to do this. If restricted so far, it appears to me to be a just conclusion that they are restricted, not only as to the masonry of the wall, but also as to the lights in that wall.

Does, then, the alteration of the appellant's title, after the mortgages of the 30th of June and the 20th of September 1866 make any difference? The appellant was from 1873 to the 6th of August 1880 (the day after this action was commenced), underlessee for a term of fourteen years, commencing on the 1st of January 1874, from one Brocklebank and others, who had been mortgagees from Jeffery, directly or by assignment, of the parcels (A) and (B), by deeds dated subsequently to September 1866, and who had foreclosed those mortgages. In 1877, Brocklebank and his co-proprietors (without the concurrence of the appellant), surrendered the original leases of those two parcels, dated the 31st of March 1866, and took from the corporation a new lease for seventy-five years, commencing on the 4th of November, 1876. On the 6th of August 1880 this new lease was assigned by

Brocklebank and his co-proprietors to the appellant. The argument for the respondents on this point appears to be, that the fourteen years under-lease thereupon became merged in the new lease of seventy-five years, and that such merger destroyed the appellant's right (if any such right existed), as against the respondents, to the lights in question. It would take more convincing arguments than were offered at your Lordships' bar to satisfy me that, apart from the rights of the corporation, such a consequence would follow, under the circumstances of this case. But I think your Lordships may be relieved from the necessity of deciding that point; because it depends altogether on the assumption that, when the land included in the parcel (B), and the buildings thereon, reverted to the corporation, whether by surrender, or forfeiture, or other means (the leases of the parcels (C) and (E) still continuing), the corporation would not have the same rights against the respondents, in respect of the lights in question, which the appellant would have had if that event had not happened. That assumption is, in my judgment, erroneous. The erection of those buildings, and the plan on which they were to be erected, entered into the terms of the lease of the parcel (B) from the corporation to Jeffery; and I am of opinion that whenever that lease came to an end, whether by surrender, forfeiture, or otherwise, the corporation would take the buildings so erected, the windows and lights included, in statu quo, as they were held and of right enjoyed by Jeffery and his assigns during the continuance of their term.

My conclusion upon the whole case is, that the order under appeal ought to be reversed, and the order of Bacon V.C restored, and that the respondents should pay the costs in the Court below, and the costs of this appeal; and I so move your Lordships.

LORD BLACKBURN:—

My Lords, this appeal is against so much of an order of the Court of Appeal as reversed an order of Bacon V.C. restraining the respondents from doing any act so as to obstruct the access of light to any of the appellant's sixteen windows. Those sixteen windows were all in a block of building which had been built on a piece of land comprised in a lease (B); ten of them derived their light from an open space or well-hole left in a block of buildings

H. L. (E.) 1885 RUSSELL v. WATTS. Lord Blackburn.

which had been built on an adjoining piece of land comprised in a lease (C). The other six derived their light from an open space left in a block of building on an adjoining piece of land comprised in a lease (E).

The case of the appellant therefore must be that he or those whose title he possesses have in respect of the ten windows acquired a right in respect of them to restrain the occupiers of (C) from doing any act to obstruct the light. Unless that is made out, the occupiers of (C) have not (as is sometimes not very accurately expressed) a right to obstruct the ten windows but they are at liberty to do anything not otherwise unlawful, though the effect may be to obstruct these windows. The case of the appellant as to the six windows is the same, substituting (E) for (C).

The whole title of both parties is known and consists entirely of deeds. As the title is a little complicated, I think it better to examine it in more detail.

Before March 1866 there were old buildings on the plot of land bounded by Church Street, Basnett Street, Leigh Street, and Tarleton Street, and those buildings were no doubt held by old titles. But after, no doubt, preliminary negotiations between Jeffery and the corporation of Liverpool, and explanations and representations by him of what he intended to do, these old buildings and old titles were all got rid of. The corporation of Liverpool on the 31st of March 1866 executed seven leases, each for seventy-five years, at a peppercorn rent, to Jeffery, and Jeffery accepted those seven leases. It was intended that those who acquired any interest from Jeffery should start from these leases as the commencement of the titles. I do not think it is at all relevant to inquire what the old titles and the preliminary negotiations were. It is, I think, important to inquire what the stipulations between the corporation and Jeffery contained in these leases were, as those would affect those claiming from Jeffery. The leases were all of the same date, and, except in the description of the parcels, in the same terms. On the margin of each is a plan (Appendix 197) which shews the whole plot of land bounded by the four streets I have named, divided into seven portions, marked with the letters A, B, C, D, E, F, and G. Each of the seven leases was of one of those portions. What we

are now concerned with are only the portions comprised in the leases (B) (C) and (E). The dealings with the other portions are relevant so far as they explain what was done as to those three portions.

In each of the seven leases was contained a covenant, "Further that the said James Reddecliffe Jeffery, his executors administrators or assigns, shall and will within the first five years of the said term hereby granted, erect and build on the said piece of land according to such plan, as well as to the height and elevation of such building or buildings respectively as otherwise, as shall be submitted by him or them to and shall be required and approved of by the council of the said borough, and that the said James Reddecliffe Jeffery, his executors, administrators, or assigns shall not alter the height or elevation of any building or buildings when so erected, nor permit the same to be altered, without the consent of the said council."

There was some controversy as to whether it was sufficiently proved what those plans were. In my opinion it is not necessary that the plans should be identified. It sufficiently appears that it was the intention of Jeffery to erect upon the piece of land between the four streets one continuous building or shop, but in such a manner as that if and when occasion should require the same should be capable of subdivision into separate buildings. The corporation and Jeffery were at the time when the leases were executed the only persons who had any interest in this. Jeffery did, as early, it appears, as 1868, certainly within five years from the date of the leases, erect the buildings on the land which were on it at the time of his bankruptcy, and those buildings do contain the windows and the open space and well previously spoken of. The corporation, who were the only persons who had a right to complain if the covenant was not strictly pursued, never made any objection.

Primâ facie each of the buildings erected on a separate lease would be occupied as a separate building; but it was Jeffery's intention to occupy the whole as one building, and there is nothing in the leases that I can discover indicating any desire on the part of the corporation that Jeffery or his assigns should not occupy the whole of the buildings on the seven pieces of land

H. L. (E.) 1885 RUSSELL v. WATTS. Lord Blackburn.

demised as one building, if convenient, nor anything to indicate an intention that they should do so, if they should find it more convenient to occupy them as separate buildings. There are covenants against altering the elevations, and against committing waste, which would enable the corporation to object to any subsequent alteration of the buildings as erected in 1868 if the corporation thought it injurious to them. But if the corporation did not object there is nothing to prevent Jeffery, whilst he occupied the whole, from utilizing the open spaces in any way he pleased, though it might obstruct the access of light to the windows. Indeed, Jeffery, whilst still occupying the whole, might if he pleased shut up those windows altogether without asking the leave of the corporation.

But no doubt it was reasonably to be expected that Jeffery when engaging in such a great work would wish to raise money. And I have no doubt that one reason why the buildings were planned in such a way that they might, if occasion should require, be occupied as separate buildings, was to facilitate raising money on mortgages of portions of the whole, there not being many mortgagees who would be willing to advance money on a mortgage which, if the mortgagee entered into possession, would cast on them the necessity of carrying on such a gigantic concern as that in which Jeffery had embarked.

However this may be, Jeffery did on the 4th of April 1866 mortgage the lease (A). This mortgage was at the time of the bankruptcy of Jeffery vested in Messrs. Brocklebank. On the 30th of June 1866 he mortgaged by way of sub-demise for seventy-five years, wanting one day, the leases (C) (G) and (F), of which Jeffery was then the unincumbered owner. On the 20th of September 1866 Jeffery conveyed the leases (D) and (E) to Duckworth by way of mortgage. In my opinion everything depends on the true construction of those two mortgage deeds of June and September. I will return to them afterwards. There were subsequent mortgages to Brocklebank of lease (B) and of the other leases, subject to the mortgages already made of them. But all those continued merely mortgages, Jeffery still being in possession and having, as already said, completed the buildings, till in 1871 Jeffery became a bankrupt. Then Messrs. Brockle-

bank, who were at that time the first mortgagees of (A) and (B) foreclosed the equity of redemption of these two leases against Jeffery and his trustee. Brocklebank was also at that time second mortgagee of the leases (C) (G) and (F), of which Messrs. Moon were first mortgagees, and were also second mortgagees of the leases (D) and (E), of which Duckworth was first mortgagee.

On the 15th of October 1872, Duckworth foreclosed the equity of redemption of Brocklebank and of Jeffery and his trustee in the leases (D) and (E) (Appendix page 253). On the 28th of January 1873, Messrs. Moon foreclosed the equity of redemption of Brocklebank and of Jeffery in the leases (C) (G) and (F) (Appendix page 252). I do not at present think it necessary to pursue the title further.

Neither the corporation, nor Brocklebank, nor Duckworth, nor Moon, raised any question as to the mode in which Jeffery had actually built the buildings such as they then were; I think we must take it that they were erected according to plans approved of by the corporation. I do not think it material whether those plans were precisely the same as those originally approved by the corporation.

Had Brocklebank, then, as assignee of the lease (B) a right to prevent Duckworth from using the buildings on (D) and (E) in any way in which Jeffery whilst occupier of all three houses might have used them, although the effect of his doing so was to darken the light which Jeffery whilst in occupation of all three enjoyed by windows in (B) overlooking (D) and (E)? In my opinion that depends entirely on the true construction of the mortgage deed executed by both Jeffery and Duckworth. It is clear to my mind that Duckworth could not use the premises on (D) and (E) in any way forbidden by the covenants in the leases, unless with the consent (express or tacit) of the corporation; but I have not been able to find anything in the mortgage deed to put any further restriction upon him.

If before Brocklebank conveyed as he did to Watts, and Duckworth to Russell, they had thought of this point it would have been very reasonable to have agreed, that in consideration that neither Duckworth nor his assignee should use (D) and (E) so as to obstruct the light which (B) at that time enjoyed, neither Brockle-

H. L. (E.) 1885 RUSSELL v. WATTS. Lord Blackburn.

bank nor his assigns should use (B) so as to obstruct the lights which (D) and (E) at that time enjoyed; and such an agreement, if properly made, would have prevented the present litigation. Perhaps they thought it was already provided for by the terms of the mortgage deeds under which they held the leases. Perhaps (and this, I think, is most probable) they did not think of it. Certainly no such agreement was made. I should be very glad to find that the mortgage deeds were so drawn as to have this very reasonable effect, but I cannot so find. I should not be sorry if the other noble and learned Lords who, along with me, heard the argument, can find this, but I cannot.

Since I had written so far I have had the advantage of perusing in print the opinion of the noble Earl (Selborne). I agree that the general rule of English law is that a man may use his land in any way he pleases not in itself unlawful, though the effect of doing so be to darken the lights of his neighbours, not being ancient lights; and I think no English Court can hinder him, even if it be done not to do himself good, but in spite, for the very purpose of darkening his neighbour's window; as the civilians say, in emulationem vicini. Of course he could not obtain the assistance of a Court for such an object.

Wherever there has been a contract made between the owners of adjoining property, it is clear that the party who actually made the contract is not entitled to do anything in breach of that contract. There is more difficulty in saying when the contract shall bind those holding part of the land by a title derived after the contract from the maker of the contract, but not themselves parties to the contract.

Before Lord Tenterden's Act it had been held that a window actually enjoyed for a long time, but shewn not to be prescriptive and not shewn to be created by any produced instrument, had the same privilege as an ancient window, because the jury might in such a case presume that there was a lost instrument having the effect of privileging the window as against all subsequent holders of the land.

All authorities agreed that an instrument might have been made, having such an effect. Some seem to have thought it must have been a covenant on the behalf of the then owner of

the land not to obstruct the window (see per Fry J., *Angus* v. *Dalton* (1)); some that it might have operated as a grant by the owner of the land of a window on the adjoining land, and that neither he nor those who claimed under him could derogate from his grant by obstructing it. Here no question can arise as to ancient windows, nor as to Lord Tenterden's Act, for the windows did not exist till within twenty years. But we actually have produced and proved the instrument said to have that effect, as to the windows looking on to (E); and it is an instrument under the seals of Jeffery, from whom the appellant makes title through Brocklebank, and of Duckworth, through whom the respondents make title.

I take it to be clear that any form of words which, when properly construed with the aid of all that is legitimately admissible to aid in the construction of a written document, indicate an agreement forms, when under seal, a covenant, and that a covenant may, if it is necessary in order to carry out the intention, operate as a grant.

I think that if the true construction of the agreement between Jeffery and Duckworth is that if Duckworth took possession of the property mortgaged to him, by the leases (D) and (E) with the buildings erected on them, he might use them as a separate building in any way not an infringement of the covenants in the lease of the corporation, and not obstructing the lights in the buildings which Jeffery had then erected, or had indicated he was going to erect, on (B), but should not use them so as to obstruct these lights, this contract would bind Duckworth's successors in title. I do not think it would be material how far the building on (B) had actually proceeded when the mortgage deed was executed, if, as seems undisputed, it was contemplated at the time of the execution of the deed of mortgage, and actually erected before Duckworth took possession. The instrument being under seal, the right would be a strictly legal one. But if, as I cannot but think, on the true construction of the deed the agreement was that the mortgagee might use the building on the leases mortgaged to him in any way he pleased, subject only to observing the covenants in the lease of the corporation, I think that the

(1) 6 App. Cas. 771.

H. L. (E.) 1885 RUSSELL v. WATTS. Lord Blackburn.

mortgagee and those who claim under him are no more restricted than if the deed had expressly said that they need not respect any windows in (B). That is certainly not said expressly in the mortgage which I am now considering; if it had been, I suppose no one would have contended that there could be any equitable ground for overruling the express contract of the parties; but even if only implied I see no equitable ground for imposing any further restriction.

The mortgage by way of sub-lease to Moon seems to have been prepared after Jeffery had prepared all his scheme, but at a time when he had not yet done anything. It was not executed until he had begun to build, and proceeded, I do not know how far, in erecting (B). This makes I think, no difference in principle from what I have already expressed to be my views in commenting on the mortgage deed to Duckworth. But it has occasioned the draftsman who prepared this under-lease to provide for much which the mortgage deed to Duckworth did not provide for, and therefore the mortgage by way of sub-lease gives more room for a difference as to its construction, but I am not able to agree with the construction put on that instrument by the noble Earl (Selborne).

I do not in the least question that, though there may be no contract under seal which could be enforced at law against those claiming under the contract, there may be a collateral contract between the parties such as to make it contrary to conscience in the contractor to use the powers which he would otherwise have had. *Swansborough* v. *Coventry* (1) seems a case of that kind. Houses, the property of one person, were put up for sale by auction in lots, and two lots were knocked down to different persons. It seems clear that at the time of the auction the understanding of both vendor and purchasers must have been that the conveyances should be prepared and executed at the same time, or with covenants that would give them the same effect as if executed simultaneously. If this understanding was sufficiently expressed to form an agreement though not under seal, the purchasers would, whilst the sale was not executed, hold under it. I think that when the conveyance was, by blunder,

(1) 9 Bing 305.

executed in a way that was contrary to this agreement, it was not conscientious for the defendant, who was himself party to the agreement, to insist on blocking a window which he would have had no right to block if the agreement had been followed out; and therefore, a Court of Equity might have restrained him, and, I suppose, those who claimed under him, at least if not purchasers without notice. But I own myself quite unable to understand in what way the Court of Common Pleas, on the pleadings and evidence as reported in that case, were able to work out this equity in a Court of law.

Lindley L.J. refers to *Dann* v. *Spurrier* (1) and *Cotching* v. *Bassett* (2), and he might have referred to *Freeman* v. *Cooke* (3) at law, as exemplifying the principle that where one man induces another to alter his position by active misleading, or by silence, where there is by contract, usage of trade, or otherwise, a duty to speak, or, in an equitable case, one may say, where the circumstances are such as to make it against conscience to be silent, his rights must be regulated by what he has himself brought about. If anyone had complained of the manner in which Jeffery, before his bankruptcy, had completed the buildings, that principle might have been invoked against him. But I quite fail to see its application to the present case.

I, therefore, come to the conclusion that the order appealed against should be affirmed.

It may be worth while to add that if I thought the construction of the mortgage deeds was such as to give the right to the appellant to the lights when they were obstructed, I do not think a merger after the writ was issued (even if such a merger would destroy a legal right, which I neither affirm nor deny) could be a ground for refusing relief.

LORD FITZGERALD:—

My Lords, it is my good fortune that in this case the facts, which are rather complicated, have been so fully and so clearly brought out in the judgments of the noble and learned Lords who have preceded me that I need not refer to them. The difficulty

(1) 7 Ves. 231. (2) 32 Beav. 101.
(3) 2 Ex. 663.

H. L. (E.) 1885 RUSSELL v. WATTS. Lord FitzGerald.

which I have felt from the beginning was not as to the proper decision to be ultimately reached, but as to the precise ground on which that decision ought to rest.

The question is, as put by Cotton L.J., has the plaintiff any and what right to say that his lights, though not ancient, are entitled to protection? And the fair way to consider that question is as if it arose between Jeffery, the original lessee of the corporation, and his mortgagees. He could not by any subsequent act or dealing of his derogate from the rights which he had conferred on the mortgagees.

The terms of the leases from the corporation and the particulars of the plans and specifications, accepted, agreed to, and acted on, have been so fully and accurately stated that I need not refer to them, but proceed at once to the mortgage of the 30th of June 1866 on the construction of which this case ought to be determined. Fry L.J. says: "Now it appears to me to be clear that the rights of the defendants must be determined by reference to the legal effect of the mortgage of the 30th of June 1866 construed by the light of the surrounding circumstances." I agree that our decision ought to rest on the fair interpretation of the leases and mortgage, guided by the light of the surrounding circumstances.

The mortgage contains, inter alia, the following recitals and provisions: "And whereas it is the intention of the said James Reddecliffe Jeffery to erect upon the piece of land hereby demised, and upon the said piece of land in the plans drawn in the margin of the hereinbefore-recited indentures marked A, B, D, and E, one continuous building or shop, but in such a manner as that if and when occasion shall require the same shall be capable of subdivision into separate buildings. And whereas the plans, elevations, sections, and specifications for the said shop" (that is the continuous building) "having been previously approved of by the council of the borough of Liverpool have been submitted to Mr. John Stewart, the surveyor of the said Edward Moon and Richard Moon, and the same, so far as they relate to the buildings to be erected on the pieces of land hereby demised have been approved by such surveyor, and have been authenticated by his signature. Now, therefore, it is hereby agreed and declared between and by the parties to these presents that, subject and

without prejudice to the covenants and conditions contained in the said several indentures of lease, the said James Reddecliffe Jeffery, his executors, administrators, or assigns, shall at his or their own expense build and finish on the pieces of land hereby demised such erections, buildings, and conveniences as shall in all respects correspond to and be in accordance with the plans, elevations, sections, and specifications approved of by the said surveyor as aforesaid, and in particular so as that the buildings to be erected on the pieces of land hereby demised shall be separated from the other portions of the said intended shop and also from each other by such party walls, and that they shall communicate with the other parts of the said shop by such doorways and passages, and that such doorways and passages shall be capable of being closed with such fireproof or other doors as in the documents last aforesaid, or some of them, are in that behalf respectively set forth and provided."

The language used in the mortgage is clear and specific, and if any doubt can arise on its construction it seems to me to be only that which must necessarily be created by the opinions of the majority of the Court of Appeal and of my noble and learned friend (Lord Blackburn). This mortgage deed expressly contemplates and declares that *one whole continuous* building shall be erected according to the plans approved of by the corporation and submitted to the surveyor of the mortgagees, in all respects to correspond to and be in accordance with such plans.

In determining what restrictions, if any, are to be implied on what otherwise might have been the strict legal rights of the mortgagees, it is essential to pay critical attention to what was the common interdependent design to be gathered from those plans and which both parties agreed should be carried into effect. The noble and learned Earl has called our attention so fully and so accurately to this portion of the case as to leave no opening to add to it; and it seems to me that there are restrictions to be fairly implied as assented to by both parties, and, inter alia, on the part of the mortgagees, not to interfere with the windows in question as shewn on the common plan, so as to intercept the light which was intended to be admitted to the plaintiff's premises through the windows which the defendants now seek to close up.

H. L. (E.) 1885 RUSSELL v. WATTS. Lord FitzGerald.

In the view which I have taken of this case, following the noble and learned Earl, it is not necessary for me, if I were disposed to do so, to criticise the very able and learned and careful judgment in *Wheeldon* v. *Burrows* (1). I agree with Lindley L.J. that "this case does not fall within it. This is not the case of a vendor of a piece of land attempting to derogate from his own grant. It is more like the case of several persons interested in several pieces of land all agreeing to build upon them in a particular way so as to accommodate one another, and of one of them afterwards, when the buildings are up, insisting on rights which are quite inconsistent with the enjoyment of the buildings as erected. There is no authority to shew that in such a case any one of such persons could afterwards build on his own land so as to obstruct his neighbour's lights."

The decision of this case, standing on its own special circumstances, does not trench on *Wheeldon* v. *Burrows* (1); and on the whole I am entirely satisfied with the reasons of the noble and learned Earl, and am of opinion with him that the decision of the Vice-Chancellor was consistent with the law of England and in accordance with right and justice.

As to the point raised and discussed towards the close of the argument of the respondents' counsel, which related to the effect of the surrender, I entirely agree with my noble and learned friends, and have nothing to add.

Order appealed from reversed; Order of Vice-Chancellor Bacon restored; the respondent to pay the appellant his costs in the Court of Appeal and his costs of this appeal. Cause remitted to the Chancery Division.

Lords' Journals 24th July 1885.

Solicitors for appellant: *Williamson, Hill, & Co., for Haigh, Son, & Co., Liverpool.*

Solicitors for respondents: *Brook & Chapman, for Goffey, North, & Co., Liverpool.*

(1) 12 Ch. D. 31.

[HOUSE OF LORDS.]

KALTENBACH, FISCHER & CO. . . . APPELLANTS;

AND

LEWIS & PEAT . . . . . RESPONDENTS.

H. L. (E.)
1885
May 7.

Principal and Agent—Advances by Brokers to Agents for Sale—Antecedent Debt—Privity of Contract—Money had and received—Factors Act, 5 & 6 *Vict.* c. 39 ss. 3, 7.

The appellants, merchants at Singapore, employed M. in London as agent to sell, without authority to pledge, cargoes which they from time to time consigned to him. M. employed the respondents, London brokers, to sell the appellants' consignments, and also in speculative purchases on his own account. The respondents purchased shellac for M. without disclosing that they were buying as agents, and therefore were personally liable to the vendors on the contracts. Subsequently they made advances to M. to enable him to pay deposits on the shellac, and took as security bills of lading of some of the appellants' cargoes. They had no notice that M. was acting improperly in pledging the cargoes. On obtaining the advances M. gave the respondents cheques for the amount of the deposits, which were then paid by the respondents:—

Held, affirming in this respect the decision of the Court of Appeal, that the obligation under which M. lay to the respondents to pay the deposits and thus prevent their being called upon to pay them, did not constitute an antecedent debt within the meaning of the Factors Act, 5 & 6 Vict. c. 39, s. 3, and that the pledges were made in respect of bonâ fide advances and not of antecedent debts, and were valid against the appellants.

M. also pledged with the respondents pepper consigned to him for sale by the appellants, to secure an advance protected by the Factors Acts. The goods had been sold for M. by the respondents, but not delivered to the purchasers, nor paid for, when M. died insolvent and heavily indebted to the respondents on a general account. After the sale but before receiving the proceeds the respondents had notice that the appellants claimed the pepper and the proceeds:—

Held, reversing in this respect the decision of the Court of Appeal, that after repayment of the respondents' advance the surplus proceeds of sale belonged to the appellants; that the appellants could sue the respondents for such surplus, whether on the ground of privity of contract, or on the ground of property, or under the Factors Act, 5 & 6 Vict. c. 39, s. 7.

New Zealand and Australian Land Company v. *Watson* (7 Q. B. D. 374) distinguished and explained.

APPEAL by the plaintiffs from an order of the Court of Appeal (Baggallay, Lindley and Fry L.JJ.) reversing a judgment of Bacon V.C. (1).

(1) 24 Ch. D. 54.

H. L. (E.) 1885 KALTENBACH v. LEWIS.

The argument in this House was limited to certain questions arising with respect to the cargoes of the *Beaconsfield*, *Comus* and *Glencallach*. The following is an outline of the facts material to this report: the details are discussed in the judgments.

The appellants are merchants carrying on business at Singapore, and from the beginning of 1878 until May 1880, they employed Charles Meyer of London, a merchant and commission agent, as their agent for the sale of foreign and colonial produce for them in London.

The course of business between the appellants and Meyer was as follows:—Goods were from time to time consigned by the appellants to Meyer for sale in London, and (inter alia) by the *Beaconsfield*, *Comus*, and *Glencallach*. Bills were drawn by the appellants against such consignments, and were accepted by Meyer. As a rule the appellants immediately upon or shortly after getting the bills, discounted them and converted them into cash. When the bills fell due they were taken up by Meyer if he had sufficient funds of the appellants in his hands to take them up. If he had not such funds, the bills were either met by the appellants or were renewed until the proceeds of sale of the goods against which they were drawn were received.

No advances were at any time made by Meyer to the appellants against consignments, and Meyer had no authority to pledge or obtain loans on the security of the bills of lading or goods.

The respondents are colonial brokers in London, and were throughout 1878, 1879 and down to May 1880, constantly employed by Meyer as brokers, in selling the appellants' goods and also in buying and selling for him colonial produce of various kinds.

In these transactions with Meyer the respondents acted as his brokers for an undisclosed principal, and by the custom of the trade made themselves personally liable in the event of his failing to complete any sale or purchase.

During the course of the transactions between the respondents and Meyer, the respondents from time to time in the ordinary course of their business made advances to Meyer upon the security of documents of title to goods, which documents were brought to and deposited with them by Meyer. Amongst other advances so

made the respondents made on the 20th of December 1879 an advance of £2000 on the security of certain consignments of pepper by the *Beaconsfield*, on the 20th of February 1880 an advance of £3000 on consignments of pepper and wheat by the *Comus*, and on the 3rd of April 1880 an advance of £800 on a consignment of pepper by the *Glencallach*. Upon such advances being made, Meyer handed over to the respondents the bills of lading relating to such consignments respectively, to be held by the respondents as security for their advances.

The advances on the *Comus* and *Glencallach* consignments were made to enable Meyer to pay deposits on goods purchased by the respondents for him as undisclosed principal, which deposits the respondents would as above stated have been bound to pay had Meyer failed to do so. The advances were effected by interchange of cheques, the respondents on the 21st of February giving Meyer their cheque for £3000 and receiving his for £3512 5*s.* 11*d.*, and on the 3rd of April giving their cheque for £800 and receiving cheques for £438 6*s.* 1*d.* and £986 9*s.* The respondents then applied the cheques received in payment of the deposits.

Meyer died on the 5th of May 1880 largely indebted both to the appellants and the respondents, and the action out of which this appeal arises was commenced on the 14th of May 1880.

Before Meyer's death the respondents as brokers for Meyer had entered into contracts to sell the above-mentioned consignments ex the *Beaconsfield* and *Comus*. But the consignment ex the *Glencallach* was not sold or contracted to be sold until after the commencement of this action. The respondents received the nett proceeds of sale of all the above consignments, the deposit on sale of the consignments ex *Beaconsfield* being the only part of such proceeds received before the commencement of this action.

The proceeds of sale of the *Beaconsfield*, *Comus*, and *Glencallach* cargoes amounted respectively to about £3650, £2995, and £880. There were thus surpluses in the case of the *Beaconsfield* and the *Glencallach* after satisfying the respondents' claims in respect of the above advances.

No question was raised on this appeal by the appellants as to the validity of the advance of £2000 on the *Beaconsfield* cargo;

H. L. (E.) 1885 KALTENBACH v. LEWIS.

and the appellants' right to the surplus proceeds of sale of the *Glencallach* cargo had been established by the Court below, against whose decision the respondents had not appealed. The only questions argued were (1) whether the appellants were entitled to recover the surplus proceeds of sale of the *Beaconsfield* cargo, and (2) whether the advances made on the *Comus* and *Glencallach* cargoes were protected by the Factors Acts.

The respondents had originally claimed a lien for balance of general account on the surplus proceeds of sale of the *Beaconsfield* cargo, but failed to prove any agreement with Meyer or any mercantile usage giving them such a lien. The Court of Appeal however decided that they were entitled to retain the surplus proceeds against the appellants on the ground that there was no privity of contract between them and the appellants. The respondents now rested their case upon that ground, and also on a statement of account between themselves and Meyer whereby the proceeds of sale had been credited to Meyer on the 23rd of March 1880, and set off against amounts owing by Meyer. This account had not been assented to by Meyer or communicated to him.

April 12, 13, 16. *R. E. Webster* Q.C. and *F. M. Abrahams* for the appellants:—

The *Beaconsfield* cargo was sold by the respondents as brokers for Meyer, and by the custom of the trade they were liable to him for the price; but that could not give them a right of set-off against the appellants. If they had been purchasers they would have been entitled to a set-off: *George* v. *Clagett* (1). But that authority applies to purchasers only, and it is the respondents' own case that they were liable as brokers. It does not apply in favour of pledgees, nor in any case where the party dealing with a factor knows that he is a factor (2). Such knowledge the respondents had at the time of some of their advances. The fact that the goods had been contracted to be sold can make no difference in the right of set-off. The possession of the goods had not been parted with nor the balance of the purchase-money paid. Meyer or the appellants might have demanded the goods

(1) 7 T. R. 359; 2 Sm. L. C. 8th ed. 118. (2) 2 Sm. L. C. 8th ed. 121.

back on payment of the £2000, subject of course to the rights of the purchasers. Apart from the Factors Acts the respondents could have no right of set-off: *Duclos* v. *Ryland* (arising in 1818) reported in a note to *Gill* v. *Kymer* (1); *Moore* v. *Clementson* (2).

It is not necessary to refer to any of the numerous cases intervening between these cases and *New Zealand and Australian Land Company* v. *Watson* (3), because they are there referred to and summed up. That case differs from this in that the plaintiffs claimed on the ground of contract or agency, not, as here, on the ground of a right of property in the goods. There is nothing in the decision inconsistent with the appellants' present contention; and Bramwell L.J. in his judgment expressed his opinion that the goods "and the produce of the goods" might be followed. The words "and the produce of the goods" were not inserted through inadvertence as suggested in the Court below. *Mildred* v. *Maspons* (4) is an authority in the appellants' favour. *Leuckart* v. *Cooper* (5) decides that there could not be a general lien for general balance by custom. Nor can the respondents make good their claim under the Factors Acts, for though under those Acts there might possibly by express agreement be a lien for general balance, none could arise by custom or general understanding. With the exception of the £2000 there was no specific advance on the security of the *Beaconsfield* cargo.

As to the *Comus* and *Glencallach*, the advances were in respect of antecedent debts, and therefore not protected by the Factors Acts, 4 Geo. 4 c. 83 ss. 1, 2; 6 Geo. 4 c. 94 ss. 1, 3; 5 & 6 Vict. c. 39 ss. 1, 2, 3. By the course of business the respondents buying the shellac as brokers for Meyer an undisclosed principal were liable for the purchase-money to the vendor. When therefore by an exchange of cheques they found the money for Meyer to pay for the shellac and took warrants from him as security, the security was really for an antecedent debt, not for an advance properly so called: *Learoyd* v. *Robinson* (6); *Phillips* v. *Huth* (7); *Macnee* v. *Gorst* (8). The respondents rely on *Jewan* v.

(1) 5 Moo. (C.P.) 518.
(2) 2 Camp. 22.
(3) 5 Q. B. D. 474; 7 Q. B. D. 374.
(4) 8 App. Cas. 874.
(5) 3 Scott, 521.
(6) 12 M. & W. 745.
(7) 6 M. & W. 572.
(8) Law Rep. 4 Eq. 315.

H. L. (E.) 1885

KALTENBACH v. LEWIS.

Whitworth (1), but there there was a bonâ fide advance: see observations in *Macnee* v. *Gorst* (2).

Sir *F. Herschell* S.G. and *Horace Davey* Q.C. (*Northmore Lawrence* with them) for the respondents:—

The transactions in respect of the *Comus* and *Glencallach*, whether the form or the substance is looked at, were not advances in respect of antecedent debts. Upon the contracts of purchase of shellac by the respondents for Meyer, until the weight notes were issued there was no debt created; and the vendors could not have sued for the price, but only for breach of contract. The cheques handed by the respondents to Meyer to pay the deposits were just as much an advance as if the respondents had not been personally liable as brokers. There was no "antecedent debt" due from Meyer to the respondents, but at most a possible liability to indemnify: the respondents were only liable to pay, if Meyer did not. The case is precisely the same as if the person making the advance had been different from the purchasing broker. The liability of the respondents, such as it was, arose from the custom of the trade, not from any contract with Meyer. The authorities cited for the appellants are distinguishable. In *Learoyd* v. *Robinson* (3) the verdict negatived the idea of a loan. In *Macnee* v. *Gorst* (4) the judgment rested partly on the fact that the bill was given in respect of an antecedent debt. The dicta of Wood V.C. in that case if pushed to their full extent are not law. *Jewan* v. *Whitworth* (1) is an authority for saying that no debt arises until the person who becomes liable to pay has paid.

As to the surplus proceeds of sale there is no cross appeal in respect of cargoes other than that per *Beaconsfield*, because in the other cases where there was a surplus there was no contract of sale, and we admit that the appellants can claim their own goods. The question only arises with respect to the *Beaconsfield*. There there had been a sale and the property in the goods had passed. The only right Meyer had after the sale was in respect of the contract. He had no right to the goods. The respondents had

(1) Law Rep. 2 Eq. 692.
(2) Law Rep. 4 Eq. at p. 323.
(3) 12 M. & W. 745.
(4) Law Rep. 4 Eq. 315.

therefore a clear right to set off as against Meyer. While the goods were unsold Meyer might have revoked the authority to sell, and the appellants the same. But once the goods were sold Meyer could not revoke, and was only entitled to the proceeds. Where the agent has parted with the property, the foreign principal can only come in subject to all the equities existing as against the agent on an adjustment of accounts. The case is on all fours with *New Zealand and Australian Land Co.* v. *Watson* (1). If the appellants can come in at all they must adopt the contract subject to all rights of set-off existing against Meyer. *Mildred* v. *Maspons* (2) is not an authority against this contention; that case was decided upon the question of notice. When the goods are once sold the Factors Acts do not apply.

The decision of the Court of Appeal was right on two grounds; first, because there was no privity between the appellants and respondents, and therefore no right of action in the appellants; secondly, because the surplus had been duly brought into account with Meyer and set-off against the amount owing by him, before his death.

R. E. Webster Q.C. in reply:—

With respect to the advances on the *Comus* and *Glencallach* there was an antecedent bargain under which a deposit and a price were to be paid. The respondents were bound to pay the deposits. The parcels were ascertained and the property had passed so that the vendors could have sued the respondents for goods sold and delivered. The advances were, therefore, in respect of antecedent debts. The Factors Acts go beyond mere debts. 6 Geo. 4 c. 94 s. 3 says, "debt or demand;" and in 5 & 6 Vict. c. 39 s. 3 "antecedent debt" includes a debt ascertained but not yet payable.

As to the *Beaconsfield*, 4 Geo. 4 c. 83 s. 3, 6 Geo. 4 c. 94 s. 6, and 5 & 6 Vict. c. 39 s. 7, shew that the proceeds of sale may be followed, and the claim can only be defeated by establishing a general lien or proving that the proceeds have been legally accounted for. On the question of statutory estoppel by the Factors Acts, see the notes to *Doe* v. *Oliver* (3).

(1) 7 Q. B. D. 374. (2) 8 App. Cas. 874. (3) 2 Sm. L. C. 8th ed. 902.

H. L. (E.) 1885 KALTENBACH v. LEWIS.

The House took time for consideration.

May 7. LORD WATSON:—

My Lords, I shall not attempt to state the facts of this case except in so far as they appear to me to have a bearing upon the questions which we have to decide. The appellants, a mercantile firm in Singapore, were in use to make consignments of produce for sale in London to the late Charles Meyer, commission agent there. These consignments were sold by Meyer through the respondents, who carry on business as colonial brokers in Mincing Lane. The respondents were generally employed by Meyer as his brokers, and they, from time to time, purchased and sold large quantities of shellac and other colonial produce on his account. Towards the end of the year 1879 the appellants consigned to Meyer 961 bags Singapore white pepper per *Beaconsfield*, and the bills of lading and other documents of title were in due course forwarded to him. On the 20th of December 1879 the respondents advanced £2000 to Meyer against these 961 bags pepper, which they afterwards sold as brokers for the nett price of £3655 18*s.* payable on the 26th of June, 1880. That sum was received by the respondents from the purchaser of the pepper on the 26th of June 1880.

Charles Meyer died insolvent on the 5th May 1880 owing a large balance upon general account to the appellants and also to the respondents. The Court of Appeal have found, and I see no reason to doubt the fact, that Meyer had made no advance to the appellants and therefore had no lien in respect of the *Beaconsfield* pepper. On the 14th of May 1880 the appellants instituted the action in which this appeal is taken and therein claimed payment, inter alia, "of the nett proceeds of sale of the pepper ex *Beaconsfield*." It is said that before the Vice-Chancellor the appellants insisted on the claim so made to its full extent; but in the Court of Appeal and at the Bar of the House they admitted that the advance of £2000 was protected by the provisions of the Factors Acts, and that the respondents were consequently entitled to retain its amount out of the price received by them.

The respondents in the Court below asserted their right to retain the balance of price remaining after payment of their advance

by virtue of an agreement alleged to have been made between themselves and Meyer, in conformity with mercantile usage, in terms of which they were to hold each and every parcel of goods impledged to them for a specific advance, as a security also for the general balance at any time due or to become due to them from Meyer. The Court of Appeal held that the respondents had failed to establish an agreement or usage to that effect, and also that a general lien of that kind was not within the protection of the Factors Acts. In that decision the respondents acquiesce, and in the arguments addressed to us their case, so far as it relates to the balance of the proceeds of the sale of pepper ex *Beaconsfield*, was rested exclusively on these two propositions,—(1) That as against them the appellants have no right of action, and (2) that the balance in question had been duly brought into account between them and Meyer and set off against the balance owing by him.

In their pleadings the respondents set forth the sale of the 961 bags of pepper per *Beaconsfield* for the nett sum of £3655 18*s*., and then go on to aver that they, in June, 1880, "received the said sum and credited it to the general account of the said Charles Meyer, and in that way retained (as they are in fact entitled to retain) the same in payment of the said sum of £2000 and in part payment of other advances made by them to the said Charles Meyer and secured by goods including the above-mentioned pepper." The import of these averments appears to be that the proceeds of the *Beaconsfield* pepper were not credited in account with Meyer until they were paid to the respondents; and that they were then credited on the footing that the pepper was pledged, not for the specific advance of £2000 only, but for the debit balance arising upon advances made by them to Meyer against other goods. The right of set-off maintained at your Lordships' bar was somewhat different. The decision of the Court of Appeal, which they do not impeach, negatived the respondents' alleged lien for their general balance, in respect of which they allege that they credited the net price of the pepper to Meyer in June 1880. They accordingly betook themselves to a defence which, so far as I can see, is not indicated in their pleadings. They maintained that they were entitled to credit

H. L. (E.) 1885 KALTENBACH v. LEWIS. Lord Watson.

Meyer with the price in account on the 23rd of March 1880; that, in point of fact, it was so brought into account, and that a set-off had arisen before the appellants intervened.

I have no desire to reject the plea of set-off thus urged for the respondents on the technical ground that it is not raised by the pleadings. The facts upon which it is founded are somewhat hazy. Some time after the death of Meyer accounts were made up by the respondents, as between the deceased and themselves, in which the price of the *Beaconsfield* pepper was credited as a payment by him on the 23rd of March 1880, but it does not appear whether these accounts were made up before or after the respondents had notice that Meyer was merely the agent of the appellants to whom the pepper belonged. In my opinion it is immaterial whether these entries were made before or after the respondents became affected by such notice. It is certain that the entries were not made with the knowledge or assent of Meyer, and it is equally certain that, had Meyer been alive and asked to assent to them, it would have been his duty to inform the respondents that the appellants were his principals, and that the price of the pepper, so far as not required to cover advances already obtained by him, belonged to his constituents and ought not to be applied in payment of his debts. In these circumstances I do not think the respondents can take any benefit from the fact of their having made up these accounts at their own hand, after Meyer's death. They could not, by an ex parte book entry create at that time a new right of lien or set-off in their own favour.

I am at a loss to understand what right or interest the respondents had in the unpaid price of the *Beaconsfield* pepper at the time of Meyer's death, other than arose from the lien which they had upon the pepper itself for their advance of £2000. They were not the purchasers of the pepper and therefore were not within the principle of *George* v. *Clagett* (1). The purchaser from an agent selling in his own name for an undisclosed principal transacts, or is presumed to transact, on the faith of his having the right to set off the price payable by him against debts owing to him by the seller; yet he cannot avail himself of any such

(1) 2 Sm. L. C. 8th ed. p. 118.

set-off arising after he has notice of the true ownership. But in the present case the price did not come into the hands of the respondents until the 26th of June; and it clearly appears from the evidence that, so far as concerns the pepper ex *Beaconsfield*, the respondents transacted with Meyer on the footing that it was specifically pledged to them for an advance of £2000, and in the erroneous belief that any margin of the pepper beyond what was necessary to cover that advance was impledged to them for the general balance due by the deceased. If the price had been received by them before they had notice of the appellants' ownership it is possible that they might have had the right to set it off against Meyer's balance—that is a point upon which it is not necessary to offer any opinion—they would certainly have had that right according to the decision in *New Zealand Company* v. *Watson* (1) if in addition to their receipt of the money Meyer had before notice consented to its being carried to his credit in account.

Let me now advert to the position of the appellants. They are foreign merchants, and according to the rule which was fully explained by Lord Blackburn in *Armstrong* v. *Stokes* (2), Meyer was not entitled in the absence of express authority to that effect to pledge their credit to the purchaser of the pepper. But that rule does not imply, and I know of no reason or authority for holding, that a foreigner who sends forward his goods in execution of the contract made by his agent is in a worse position than he would have occupied if he had been resident in England, as regards his right to follow his goods or their proceeds. I am accordingly of opinion that the intervention of the appellants in the beginning of May 1880 was to all intents and purposes just as effective for the protection of their interests as if they had been home instead of foreign principals.

I do not doubt that the respondents, as brokers and as pledgees for an advance made against the pepper, were proper recipients of the price from the purchaser on the 26th of June. They had the right to repay themselves the amount of their advance, and they could also have availed themselves of any lien on the price which Meyer held as against the appellants, had such right existed.

(1) 7 Q. B. D. 374. (2) Law Rep. 7 Q. B. 598, 605.

H. L. (E.) 1885 KALTENBACH v. LEWIS. Lord Watson.

But the notice which they previously had of the appellants' interest was sufficient in my opinion to defeat any right of set-off against the appellants' factor which might otherwise have accrued to the respondents after the money came into their hands. On these grounds I have come to the conclusion that the price of the *Beaconsfield* pepper, under deduction of the respondents' advance of £2000, belongs to the appellants, and I am also of opinion that they can sue the respondents for its amount. This is not the case of a sub-agent employed by the factor who has received and dealt with money in the bonâ fide belief that it belonged to his employer. The respondents must be taken to have received the price in the knowledge that the balance in question belonged to the appellants, and that they had no right to deal with it as the property of Meyer. In these circumstances I am of opinion that the appellants have a right of action against the respondents as for money had and received on their account.

The learned judges of the Court of Appeal negatived the appellants' right to sue, and affirmed the respondents' right to set off the nett price of the pepper in account with Meyer, being of opinion that, on both these points, the present case is ruled by *New Zealand Company* v. *Watson* (1). I venture to think that the judgment in that case, which in its essential features presents a marked contrast to the case before us, does not support either conclusion. In *New Zealand Company* v. *Watson* (1) the defendant, a sub-agent employed by the plaintiffs' factor, had received the price, had paid part to the factor, and, with the assent of the latter, had carried the remainder to his credit in account current, before he had any notice that the plaintiffs were owners of the goods. Besides, the action was laid upon contract of employment between the defendant and their agent, to which the plaintiffs were not privy. My noble and learned friend (Lord Bramwell) who delivered the leading judgment, stated that, apart from privity of contract, an owner might follow his goods and their produce; but no such case was raised on the pleadings, and it was therefore unnecessary to define the limits within which the right might be exercised. I understand my noble and learned friend to have been of opinion that, even if the

(1) 7 Q. B. D. 374.

action had been founded on the plaintiffs' ownership, the defendant would only have been liable for the balance, if any, remaining in his hands after adjustment of his accounts with the factor. With that opinion I entirely agree, because what had been done in that case before the defendant had notice of the plaintiffs' rights was practically the same as if the defendant had paid over the whole proceeds of sale to his employers, and had then received back part, in satisfaction of a debt due to him.

The other question which we have to determine relates to advances made by the respondents to Meyer against certain lots of pepper consigned by the appellants per the *Comus* and *Glencallach*. Meyer had purchased a quantity of shellac through the respondents, the deposit being payable on the 21st of February 1880. On the 20th of February he applied to the respondents for an advance of £3000 on the security of the peppers per *Comus* to enable him to pay the deposit. In compliance with that request, the respondents on the 21st of February, gave Meyer their cheque for £3000 and received from him in exchange a cheque for £3512 5*s.* 11*d.*, which they applied in payment of the deposit. On the 3rd of April 1880 the respondents advanced £800 on security of the pepper per *Glencallach* under circumstances which are admitted to have been so similar to those of the preceding transaction that it is unnecessary to detail them. The explanation which the respondents make in their pleadings with regard to these transactions is as follows,—that "the amount of such advances was arranged with reference to some debt or claim due, or about to become due, from the said Charles Meyer in respect of the transactions of the said Charles Meyer, so conducted through the defendants acting as his brokers as aforesaid, and that it was part of the arrangement that the defendants were to give their cheque to the said Charles Meyer for such arranged amount in exchange for such documents, and were themselves to receive in exchange shortly after from the said Charles Meyer a cheque or cheques to an amount sufficient to discharge such liability incurred by the defendants as his brokers on his own account and in respect of his transactions carried on through the defendants as his brokers." I think the evidence shews that the respondents believed, and that it was

H. L. (E.) 1885 KALTENBACH v. LEWIS. Lord Watson.

the fact, that the purchases of shellac to meet which Meyer obtained the advances in question were made by him on his own account. On the other hand, although the respondents knew that in some instances Meyer had acted as agent for the appellants in the sale of colonial produce, it does not appear that they had either notice or knowledge that he was not the real owner of the pepper ex *Comus* and *Glencallach*.

The appellants contend that the liens which the respondents claim, for these sums of £3000 and £800 respectively, on the peppers ex *Comus* and *Glencallach* (which are beyond all question invalid according to the common law), are excluded from the benefit of the Factors Acts, inasmuch as they were intended to discharge or secure an antecedent debt, and also in respect they were not bonâ fide transactions within the meaning of these Acts. In support of that contention various authorities were cited, which I shall now consider.

Learoyd v. *Robinson* (1) was a case in which a factor had pledged the goods of the plaintiff, his principal, for £300, which he got from the defendant in order to take up a bill of that amount upon which they were jointly liable. Coltman, J., left it to the jury to say whether the transaction was in reality one of loan, and the jury found in the negative. Great stress was laid by the appellants' counsel upon an observation made by Parke, B., (afterwards Lord Wensleydale) in refusing a motion for a new trial, to the effect that "the transaction was not that of a loan at all, and the owner of the goods never had the least chance of getting the money." The observation was justified by the facts of the case; but I do not think there is any analogy between the case of money actually paid to a real borrower in order that he may pay his own debt, and the case of money paid to a so-called borrower in order that he may pay the so-called lender's debt.

Again in *Navulshaw* v. *Brownrigg* (2) advances were made to a factor by a firm who had notice that the goods pledged to them had been consigned to the factor for sale. Lord Cranworth (Vice-Chancellor) and Lord St. Leonards (Chancellor) both held that there is no inconsistency between a factor having authority to pledge and also a power of sale; and, being of opinion that the

(1) 12 M. & W. 745. (2) 2 D. M. & G. 441.

firm acted in good faith, they upheld the pledge as a transaction protected by 5 & 6 Vict. c. 39.

In *Jewan* v. *Whitworth* (1), Hodgson, the plaintiff's factor, employed Whitworth to buy cotton for him, on his own account. Whitworth employed Clare & Sons, brokers, and they bought the cotton in name of Whitworth, and did not themselves become liable to the vendor. In order to secure Whitworth, Hodgson transferred to him bill of lading and policies of insurance for 243 bales cotton consigned for sale by the plaintiffs; and Whitworth impledged these to Clare & Sons, in consideration of their paying the price of the cotton, and making some small advances on his account. The 243 bales cotton were lost at sea, and the plaintiffs claimed the policies of insurance, in respect that they had been pledged in order to secure an antecedent liability by Hodgson to Whitworth. Lord Hatherley (then Vice-Chancellor) was of opinion that there was no antecedent debt due from Hodgson to Whitworth, inasmuch as "when the contract fell due Whitworth became liable to the cotton sellers, but, as between himself and Hodgson, a debt arose only at the moment when he first paid any money." But his Lordship rested his judgment in favour of the defendants mainly upon the fact that the transaction was in reality a pledge to Clare & Sons, who were under no antecedent liability.

A case which comes, in one aspect of it, nearer to the present is *Macnee* v. *Gorst* (2). Hodgson had accepted a bill to Gorst, his broker, for £2709 3*s*., of which £2209 was then due as the price of cotton bought by Gorst on his account, and the balance for estimated losses on previous transactions. Gorst had, besides, purchased for Hodgson a lot of cotton which he had resold at an estimated loss of £1250. Hodgson indorsed and delivered to Gorst bills of lading for goods consigned by the plaintiffs, in consideration of his making a cash advance of £500 (as to which no objection was raised), and undertaking to retire Hodgson's acceptance, and pay the loss of £1250. Lord Hatherley held that, so far as concerned these items, the pledge had been made in respect of antecedent debt; being of opinion that, although Gorst had not, at its date, paid the sellers the price which was then past due, the parties had so dealt with each other as to

(1) Law Rep. 2 Eq. 692.

(2) Law Rep. 4 Eq. 315.

H. L. (E.) 1885 KALTENBACH v. LEWIS. Lord Watson.

constitute indebtedness by Hodgson to his broker. But his Lordship went on to say, "If I should be wrong in that view, and if this should not be an antecedent debt, but only a liability, then I think it is a transaction which is not protected by the statute, because I read the 3rd section of 5 & 6 Vict. c. 39, as protecting nothing except an actual advance of money; and I look at this transaction as one in which Gorst relieved himself from a liability under which he was placed, borrowing no money from anybody, and placing no money in the hands of those who pledged the goods."

I do not think the pledges of pepper ex the *Comus* and *Glencallach* were for or in respect of an antecedent debt within the meaning of sect. 3 of 5 & 6 Vict. c. 39. What that section provides is, that no lien or pledge shall have the benefit of the Act, which is given by a factor in order to secure a debt then owing by him to the pledgee. The respondents were, no doubt, liable upon their contracts to the sellers of the shellac, if Meyer failed to pay; but, even in the event of his failure, Meyer would not have become indebted to them until they actually paid the sellers. To treat such a possible indebtedness, in the future, as a debt existing before the date of the advances in question, appears to me to be inconsistent with any reasonable interpretation of the language of the Act, and would be contrary to the views expressed by Lord Hatherley in *Jewan* v. *Whitworth* (1) and *Macnee* v. *Gorst* (2).

It still remains for consideration whether the transactions between Meyer and the respondents, which involved the pledge of these peppers, were in reality transactions of borrowing and lending. That is a question which I have felt to be attended with difficulty; but I have come to the same conclusion with the learned judges of the Court of Appeal. I am not prepared to hold that a broker who, in purchasing goods for a factor, has made himself responsible to the vendor, cannot thereafter make a bonâ fide advance to the factor, to enable him to pay for the goods bought on his account. And, if the broker can and does make such an advance, and accepts a pledge to secure its repayment, I can find nothing in the Act of 5 & 6 Vict. to deprive the pledgee

(1) Law Rep. 2 Eq. 692. (2) Law Rep. 4 Eq. 315.

of its protection. On the other hand, if the broker, instead of advancing money, in bonâ fide, to enable his principal to pay for the goods, were to take security for the purpose of relieving himself of a liability which he had incurred, I do not think it could, with any propriety, be said, that he had made an advance of money within the meaning of the Act. That appears to me to have been the alternative view taken by Lord Hatherley in *Macnee* v. *Gorst* (1). But in the present case there appears to me to be nothing to warrant the inference that the advances in question were not, in substance as well as in form, loans; or that the respondents parted with their money, and took security, with the view of relieving themselves from liability. In anticipation of the deposits becoming due, the respondents, following the ordinary course of their business, gave their money to Meyer, who cashed their cheques and applied the proceeds for his own behoof. The cheques which he gave to the respondents were not, in my opinion, given for the purpose of putting the respondents in funds to meet their liabilities to the sellers, but were payments made to them as brokers for the sellers, and in due implement of Meyer's obligation as the real principal under the contracts of sale.

I am therefore of opinion that the order appealed from, so far as it is thereby ordered that so much of the appellants' (plaintiffs') action as relates to the goods consigned per *Beaconsfield*, do stand dismissed, be reversed.

I understand your Lordships to be agreed that, in this case, each party should bear their own costs—and consequently that the respondents must be ordered to repay the costs already paid to them by the appellants in the Court below, and that there be no costs of this appeal:—And I move accordingly.

LORD BRAMWELL:—

My Lords, I think it convenient to consider this case in the order in which it was dealt with by the Court of Appeal. Then first, are the defendants' advances, if advances they were, on the goods by the *Comus* and *Glencallach* protected by the Factors Act? The question really is, Were there *advances?* The clause

(1) Law Rep. 4 Eq. 315.

H. L. (E.) 1885 KALTENBACH v. LEWIS. Lord Bramwell.

in sect. 3 is only explanatory of sect. 1. It says that there is no advance when the pledge is for an antecedent debt. In considering this question, I think it immaterial that there were cheques given by the defendants to Meyer and by him to them. I treat the matter as though there was an agreement that the deposits on the shellac should be paid, and as though the defendants had paid the sellers of the shellac prompt and debited Meyer in account with the amount. To do otherwise would be to give a substantial effect to what was mere book or account keeping. I also think it immaterial that nothing was due and *payable* at the time of the pledge. It would be enough if it was *due*, though in futuro, in this case the next day. Further, I think that Mr. Webster completely answered the Solicitor-General's argument that the defendants were not liable for the principal or instalment due on the goods they had purchased for Meyer, but for unliquidated damages only. I find and assume that the sellers to the defendants could have maintained an action against the defendants for the instalment due. Still, whether as a matter of law or fact, I hold that there were advances and not merely an antecedent debt. I agree on this head with the reasoning of the Court of Appeal. I also agree with their treatment of the authorities. That there were advances, in fact, there cannot be a doubt. The defendants parted with their money. On their so doing, Meyer became indebted to them for money lent, and would be liable by agreement to pay principal and interest to date of payment. If the defendants had sold the shellac, and Meyer had sued for the proceeds, the defendants would have had a set-off for money lent. The pledge was not for the debt he owed *them*. It was to raise money to pay the debt he owed the remoter sellers of the goods; those sellers might have interposed and claimed the price from Meyer, and Meyer really handed his cheques to the defendants, not to pay them, but to pay the remoter sellers. It is true that he thereby performed an obligation or duty to the defendants, and prevented his owing a debt to them, but still it was a payment made by him to them, not as his creditors, but as his agents to pay the original sellers, or as agents of those original sellers. The pledges, then, were for advances and not for antecedent debts. I wish to add that such expressions as that the

principals, in this case the plaintiffs, "get no chance of benefit from the advance," are not to be taken as shewing that the advance is not protected, but as a test applicable in some cases. So far, therefore, I entirely agree with the Court of Appeal, and think their judgment should be affirmed.

It is scarcely necessary to mention the defendants' claim for a general lien, for it was substantially given up, and properly. That the defendants thought they had one I doubt not, but there is not the least evidence of any agreement at the time of making those advances for a general lien; and I think the conversation when Meyer asked for the *Beaconsfield* balance does not shew there had been any such agreement. No doubt each fresh advance might be made on the security of all property before pledged, as well as on additional. Of this there is really no evidence. As a claim for a mere lien the Factors Act would not maintain it. On this question I am also in entire agreement with the Court of Appeal.

There remains the question as to the *Beaconsfield* cargo. Let us see what are the relevant facts. The goods belonged to the plaintiffs. They entrusted them to Meyer for sale, and to employ a broker to sell. Meyer employed the defendants to sell. They sold. They advanced £2000 to Meyer on the goods. They retained possession of the goods as against those to whom they had sold under the agreement of sale till payment of the balance of the purchase-money. Before they received that, and while still in possession of the goods, they received notice from the plaintiffs that the goods belonged to them, and that they claimed them and the balance of the price.

I say these are the facts, and all the relevant facts. For as to the defendants putting down in their books that they credited Meyer on the 23rd of March, it is idle and to be regretted. The other advances and other transactions are out of the question. Then are the plaintiffs entitled to the proceeds of these goods minus the £2000 and defendants' charges? One is inclined to say, "Why not?" Suppose there had been no advance of the £2000, would the defendants be entitled to receive and keep the whole price of the goods? To whom would they account? To Meyer's executors had he died solvent? to the trustees of the bank-

H. L. (E.) 1885 KALTENBACH v. LEWIS. Lord Bramwell.

ruptcy as the case is? Why? Surely the plaintiffs might give notice that they discontinued Meyer's agency, and revoked his authority if living, and require the defendants to deal directly with them. But if so, the £2000 makes no difference, except this, that the plaintiffs must allow for it. There is no difficulty about privity of contract. For if the defendants are treated as vendees the real vendors are the plaintiffs. And if the defendants are treated as agents Meyer had authority to establish the relation of principal and agent between plaintiffs and defendants. But the question may also be dealt with as one of property. The plaintiffs are vendors of goods which are in the hands of the defendants, undelivered to the ultimate vendees, and to the possession of which the plaintiffs were entitled on satisfying defendants' lien. Besides this, there is sect. 7 of 5 & 6 Vict. which, without regard to contract or property, says the true owner may recover from the pledgee the balance of the proceeds after satisfying his lien. The Court of Appeal say, "By our law the plaintiffs, being a foreign house, cannot sue the defendants for this *debt*, or if they can they can only sue them as representing Meyer, and subject to all rights of set-off available against him. *New Zealand Co.* v. *Watson* (1) appears to us conclusive on this point" (2). To this, with all respect, I cannot agree. There are in this case three things which did not exist in the case cited. There is privity between the plaintiffs and defendants, there is existing property or rights of possession in the plaintiffs when notice was given to the defendants, and there is the right given to the plaintiffs by sect. 7 of 5 & 6 Vict. c. 39. In the case cited the Factors Act, as truly said by the Court of Appeal, was not in question. Here it is, and must be relied on by the defendants, otherwise the pledge to them was wholly tortious. I must add that the reasoning of the Court of Appeal on which they gave judgment for the appellants as to the goods per *Soteria*, *Lansdowne*, and *Glencallach*, seems to me to warrant the opinion I express as to the goods in question. The Court distinguishes the *Beaconsfield* balance from those cases, because in them the goods were not sold when Meyer died, as were those by the *Beaconsfield*. But I cannot, with all respect, see how that affects the question. I repeat that, though by the

(1) 7 Q. B. D. 374. (2) 24 Ch. D. 82.

sale the property was changed, the right to possession remained. There is privity between the plaintiffs and defendants, and there is the right given by the Factors Act. I am of opinion that, as to this part of the case, the judgment was wrong and should be reversed.

I wish to add, that, in the report of my judgment in *New Zealand Co.* v. *Watson* (1), the words "produce of goods" did not "get in by mistake." I said and think as reported, on the authority of cases then cited by Mr. Barnes. But there there was no privity, and before notice to the then defendants the "produce" was blended in the general account with the intermediate man, Thielman. I agree with my noble and learned friends as to the order which should be made with reference to the costs.

LORD FITZGERALD:—

My Lords, the first question on which I propose to make some observations is, whether the advance of £3000 alleged to have been made on the cargo of the *Comus* is protected by the Factors Act, 5 & 6 Vict. c. 39, ss. 1, 3. Was it an advance really and truly made on the security of the shipping documents and so made in good faith?

My noble and learned friends have so fully and accurately stated the facts from which we are to draw proper inferences that it is not necessary to recapitulate them. This item of £3000 is brought into account thus: "1880, Feb. 20, cash account pepper per *C.* £3000"; but the cheque for that sum was probably not actually given until the 21st of February 1880, as will be seen by the copy of the cheque, which is exhibit No. 23 Appx. p. 261, and which is dated the 21st of February. It is not easy to follow the details given in the defendants' accounts made up after Meyer's death; but I collect from them that the defendants were, in February 1880, in advance for Meyer, or were liable on his account for deposits on shellac to somewhere about £21,000 over all credits; and looking to account No. 30 at page 269, Meyer is debited on the shellac deposits account on the 10th of February 1880 to the extent of about £10,000. There being in some shape

(1) 7 Q. B. D. 374.

H. L. (E.) 1885 KALTENBACH v. LEWIS. Lord FitzGerald.

or other a large sum becoming due on the 21st of February 1880 for deposits on shellac, those being transactions with which the plaintiffs had no concern, Meyer on the 20th of February 1880 wrote to the defendants as follows: "Dear Sirs,—Can you oblige me to morrow with a loan of £3000 against enclosed securities, the insured value of which is £3700. The goods have been sold by you to arrive. I have nearly this amount to pay tomorrow in deposits on shellac." The "enclosed securities" mentioned in the letter were, I infer, one part of the bill of lading of the *Comus*, and some other of the shipping documents of that vessel; and the "amount to pay tomorrow in deposits on shellac" represented the sums to be paid by Meyer to the defendants for their undisclosed principals, and which the defendants were liable to pay on the 21st if Meyer did not. Meyer had an interview on the same evening with Mr. Figgis, one of the defendants. He is examined as a witness, but I have not been able to find any account of what then took place—we are left entirely to conjecture. The fact of the interview appears from the next letter.

On the 21st of February Meyer received from the defendants their cheque for £3000 to pay the deposits, and he paid the deposits to them by giving them on the same occasion his cheque for a larger amount. On the 21st of February Meyer again writes to the defendants. He says: "Dear Sirs,—As promised to Mr. Figgis last night I beg to hand you as further guarantee for your loan of £3000, for which I thank you, enclosed warrants," and a number of warrants for shellac were enclosed in the letter. The defendants were not satisfied with the security, and on the 24th of February wrote to Meyer, "Please let us have the other bills of lading of pepper as proposed or warrants for other produce to cover our loan;" to which Meyer replied on the same date, "I am writing to-night again about the said bills of lading, and will let you have the same as soon as I get them." The defendants continued to press for the bills of lading, and Meyer wrote to the plaintiffs more than once to forward them, but misrepresenting the purpose for which they were wanted.

On the 1st of March, Meyer wrote to the defendants thus: "Messrs. Lewis & Peat,—Dear Sirs,—I am writing to-day a most strong letter to my friends about the complement of the said

bills of lading of pepper given to you as guarantee, and have no doubt that I will be able to hand you the same without any more delay on Wednesday morning. I am most anxious to place in your hands every possible moral and material guarantee in order to cover you fully for your loan and to rest your mind. I am most thankful for the aid given to me, And believe me, Yours respectfully, Charles Meyer." The "most strong letter" which is referred to there is as follows and deserves attention—it is a letter addressed by Meyer to Kaltenbach: "London, 1st March, 1880.—I write to ask you whether you have not the duplicates of the bills of lading ex *Comus*. Having different buyers for the two lots I must hand them one exemplar with the declaration. Bills of lading are generally in triplicate. If you have several bills of lading for these lots please let me have them as soon as possible. Kindly send me the bills of lading ex *Comus* without fail as I am asked for them for Wednesday morning." The bills of lading appear to have been forwarded soon afterwards and delivered to the defendants, and so this transaction, whatever it was, came to a conclusion. It will be observed from this correspondence that the transaction is not treated as an ordinary advance on goods, but as a loan from the defendants to Meyer, guaranteed by a deposit of the shipping documents of property which the defendants had the full means of knowing was not the property of Meyer, and they had also a plain indication that he was not dealing candidly with his principals.

If the case had come before me alone, and if I had been unfettered by the authority of the Court of Appeal, I should have hesitated long before I could come to the conclusion that this transaction of the £3000 cheque was an advance really and truly in good faith on the security of the cargo within the meaning of the statute, and not in respect of any antecedent debt owing from Meyer to the defendants, and I should probably have inferred that it represented a circuitous course of dealing by which the defendants' liabilities for Meyer were lessened, whilst they retained the whole security of the shellac in respect of which the prompts were payable, at the same time getting as an additional security a pledge of goods which they knew to be the goods of the plaintiffs. And I may add that the letter of the

H. L. (E.) 1885 KALTENBACH v. LEWIS. Lord FitzGerald.

1st of March ought to have led the defendants to ask whether the plaintiffs had authorized Meyer to pledge their property for this "loan" to him.

It was urged, however, that there was no antecedent debt owing from Meyer to the defendants within the meaning of the 3rd section of the statute. This is literally and technically true; but there was an antecedent liability which would on the 21st of February have ripened into a debt if the defendants had not on that day given Meyer the means to meet it in the manner described. The transaction would seem to me to have been contrary to the spirit and intention though not against the letter of the statute.

But on this question I confess myself to be overwhelmed by the authority of my noble and learned friends, and especially by that of my noble and learned friend Lord Bramwell, whose superior judgment and vast experience give additional weight to his reasoning. It is quite true that the Act of the Queen popularly called "The new Factors Act" was intended to facilitate and make safe advances of capital on deposit of goods or the documents of title which represent them. The transactions which are from day to day carried on under the protection of the statute are of vast amount and of great utility to the operations of commerce, and we ought not in the interpretation of the Act to lessen the protection of such dealings or impede them by any unnecessary difficulties. Though I hesitate as to the proper and just inference to be drawn from the facts in proof, I do not venture to dissent upon this question from my noble and learned friends.

The remaining question is as to the surplus of the proceeds of the cargo of the *Beaconsfield* after deducting the defendants' advance of £2000. The sale of that cargo was in December 1879 to arrive. The vessel arrived in March, but the price did not become payable until June and was not received before that time. The defendants failed to establish any lien either by custom or contract. If they had received the amount in the lifetime of Meyer they might properly have paid it over to him or they might have accounted with him and given him credit for the amount against any debt which he then owed them; but on his

death and the intervention of the plaintiffs, the real owners, the rights of the defendants were confined to the amount due on foot of the admitted advance of £2000, and the surplus when received became money had and received to the use of the plaintiffs. Then why are the plaintiffs not to have it? The answer given in the Court of Appeal was *New Zealand Company* v. *Watson* (1) and the judgment of Lord Justice Bramwell in that case. The authority of that case has not been questioned, and it has been carefully explained by my noble and learned friends. I shall only say that it was one which depended on special circumstances, with particular pleadings and issues, and special findings of the jury; and it is enough to say of it that it does not govern the present case.

In the judgment of the Court of Appeal it is said, at page 82, "The proceeds of sale" (speaking of this particular thing) "became a debt owing by the defendants to Meyer, and he could have sued the defendants for such debt; but they could have successfully set off against his demand all debts owing by him to them." Then comes the proposition, "By our law the plaintiffs, being a foreign house, cannot sue the defendants for this debt, or if they can they can only sue them as representing Meyer and subject to all rights of set-off available against him." And at page 84 this is added, "Here Meyer was authorized to employ the defendants in his own name, and they are therefore entitled to satisfy by set-off the debt arising from the sale of the plaintiffs' goods during Meyer's lifetime," though that debt and that money had not been received for months after his decease."

I understand your Lordships not to assent to these propositions as so stated, and I may adopt, in reference to them, the language of the Court of Appeal at page 81, where in the judgment it is said, "If these propositions were well-founded" (adverting to different propositions, but I apply it to the two which I have quoted) "it seems to us that the Factors Acts will practically have ceased to have any application to foreign principals consigning goods to this country for sale; for if the defendants are right in their contention it will follow that the protection afforded by those Acts to foreign merchants will have been

(1) 7 Q. B. D. 374.

H. L. (E.) 1885 KALTENBACH v. LEWIS. Lord FitzGerald.

destroyed by modern decisions, and that the limited protection given by those Acts to persons making advances to factors of foreign merchants will have been practically replaced by an unlimited protection given by judicial authority to all persons making advances to such factors or otherwise becoming their creditors."

I may add that if the judgment of the Court of Appeal on this part of the case was to be upheld for the reasons given it would practically abrogate, as to foreign principals, sect. 7 of the statute.

The case of *Maspons* v. *Mildred* (1) was somewhat relied on in the Court of Appeal. I shall only say of that case that the defendants can derive no countenance from it as considered and decided in this House and reported in 8 App. Cas. p. 874, and especially from the judgment in your Lordships' House as delivered by my noble and learned friend Lord Blackburn.

On this second question I entirely concur with my noble and learned friends.

Order appealed from reversed in so far as it is thereby ordered that so much of the plaintiffs' action as relates to the goods consigned per Beaconsfield *do stand dismissed. In lieu thereof declared that the plaintiffs are entitled to the proceeds of the goods consigned per* Beaconsfield, *subject to the defendants' lien for the sum of* £2000 *in the pleadings mentioned. The respondents to repay to the appellants the costs already paid to them by the appellants. In other respects order appealed from affirmed. Cause remitted to the Chancery Division.*

Lords' Journals 7th May 1885.

Solicitors for appellants: *Michael Abrahams, Son, & Co.*
Solicitors for respondents: *Hollams, Son, & Coward.*

(1) 9 Q. B. D. 530.

[PRIVY COUNCIL.]

PRÉVOST . . . . . APPELLANT;

AND

LA COMPAGNIE DE FIVES-LILLE AND THE ATTORNEY-GENERAL OF CANADA . . . . . RESPONDENTS.

J. C.*
1885
June 25, 26; *July* 18.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, PROVINCE OF QUEBEC.

Law of Lower Canada—Sheriff's Sale of an Immeuble—Duty of Vendor to give Possession—Rights of Purchaser.

A sheriff's sale of a sugar factory with the fixed machinery therein, as of an immeuble, having taken place on the distinct footing that the property was sold free of all charges, the customs authorities on the next day, acting under a bref d'assistance, seized the whole machinery and refused to give or allow delivery until the whole export duties chargeable in respect of the machinery were paid:—

Held, that whether the claim of the Crown was well founded or not, the seizing and detaining the machinery was in virtue of a warrant ex facie regular, and effectually prevented the seller from giving possession, and consequently relieved the purchaser from his obligation to pay the price.

There is nothing either in the Civil or Procedure Code of Lower Canada which casts upon such a purchaser the obligation to pay the price and thereafter get possession from a third party as he may. Sect. 712 of the C. P. L. C. relates to dispossessing the judgment debtor only.

APPEAL from a judgment of the Court of Queen's Bench (Jan. 23, 1884) affirming a judgment of the Superior Court at Montreal (Dec. 29, 1882) in favour of the respondents. The judgments were pronounced in the matter of cross-petitions by the appellant and the respondent company, the Attorney-General intervening in the Court of Queen's Bench.

The facts and proceedings are stated in the judgment of their Lordships.

The Superior Court held that the sale was valid and purged the

* *Present:*—LORD WATSON, LORD MONKSWELL, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

J. C. 1885 PRÉVOST v. LA COMPAGNIE DE FIVES-LILLE.

privileges and liens upon the land, and that no reason was shewn why the appellant should not have possession thereof on paying the price.

Upon intervening the Attorney-General prayed for a declaration that the machinery seized and sold was at the time of seizure in the possession of the customs authorities; and that the sheriff be ordered not to proceed with the adjudication to the purchaser of the said property in so far as the said machinery is concerned. And further, that it be adjudged that the seizure under the writ of assistance by the Crown was good and valid, and that the machinery was in possession of the Crown for the purpose of holding it till the duties thereon were paid.

The Court of Queen's Bench affirmed the judgment of the Superior Court and ordered the writ of venditioni exponas to issue, but that the Crown be permitted to enforce its rights upon that part of the price which should represent the value of the machinery.

Lacoste, Q.C. (of the Canadian bar), and *Fullarton*, for the appellant, contended that the sheriff was unable to give him possession and that therefore he was not bound to pay the purchase-money: C. C. 1591, 1491..3. The sheriff's seizure was invalid, for the factory had been constituted a bonded warehouse under the provisions of Quebec Act, 40 Vict. c. 10, and the possession thereof, together with that of the machinery, was in the Crown. See C. P. L. C. 553, 612, 632. The sheriff's sale did not discharge the right of the Crown: C. P. L. C. 714. The Crown is not affected by any section of the Civil Procedure Code in which it is not specifically mentioned, compare for instance sect. 2086 of C. C. with sect. 711 of C. P. L. C.: *Monk* v. *Ouimet* (1).

Lumley Smith, Q.C., and *Gye* (*Archambault* of the Canadian bar with them), for the respondent company, contended that the effect of the sale and adjudication was to discharge the privilege and rights of the Crown. The appellant, as purchaser, had a title free from such rights. No seizure was made by the Crown until after the sale, and even if the seizure was regularly effected

(1) 19 L. C. J. 74.

J. C.
1885
PRÉVOST
v.
LA COMPAGNIE DE FIVES-LILLE.

it would not affect the purchaser. The Crown had no right to seize. Reference was made to C. P. L. C. 589; C. C. 1567, 1508, 1513, 1496. The only rights which the Crown could have would be by a privilege, charge, or hypothec. That could only be obtained by registration: C. C. 2015, 2086, 2026, 2032, 2127. Moreover, it could only have such privilege while in possession, and upon parting with possession it lost its privilege: C. C. 1970. The purchaser's title was complete on adjudication, and it was his duty to sue for possession: C. P. L. C. 712. As to the Crown's right of seizure, if any, having been discharged see *Attorney-General* v. *Norstedt.* (1)

The Solicitor-General (Sir *F. Herschell*), *Church*, Q.C., and *Jeune*, for the Attorney-General of Canada.

Counsel for the appellant were not called on to reply.

1885
July 18.

The judgment of their Lordships was delivered by

LORD WATSON:—

The respondents, La Compagnie de Fives-Lille, on the 25th of May, 1882, recovered judgment in the Superior Court of Lower Canada against the Union Sucrière Franco-Canadienne, for $33,293. 69*c.*, with interest; and, on the 10th of June, 1882, a writ of fieri facias was duly issued to the sheriff of the district of Richelieu, directing him to levy that sum upon the property, real and personal, of the judgment debtors. The sheriff, in execution of the writ, seized certain buildings, with the fixed machinery therein, belonging to the judgment debtors, which had been erected and used by them for the manufacture of beet-root sugar, situated in the parish of Berthier and district of Richelieu, and advertised the same for sale, as an immeuble, upon the 28th of August, 1882.

On the morning of the day of sale, John Lewis, an officer of the customs at Montreal, intimated to the sheriff, by letter, that the fixed machinery of the sugar factory was held by the Crown, under bond, for unpaid import duties, and could not be sold, unless subject to the condition that these duties were to be paid

(1) 3 Price, 97.

J. C. 1885 PRÉVOST v. LA COMPAGNIE DE FIVES-LILLE.

before any part of the machinery was removed from the premises. The claim thus asserted on behalf of the Crown became known to the appellant, Arthur Prévost, as well as to many other persons, who attended, on the 28th of August, 1882, for the purpose of bidding at the sale. Accordingly, the appellant Prévost, before the bidding commenced, asked the sheriff whether the property was to be sold free of all charges, to which the sheriff answered, "Yes." The bidding then went on; and eventually the property was knocked down, and adjudicated to the appellant, at the price of $76,000. That the sale was conducted, and the purchase made by the appellant, on the distinct footing that the property was sold free of all charges, is made perfectly clear by the return of the sheriff, in which he expressly states that he disregarded the intimation given to him by Lewis, being of opinion that he had no authority to give effect to the condition which the Crown sought to impose.

On the 29th of August, 1882, the day after the sale, the customs' authorities, acting in virtue of a formal bref d'assistance, seized the whole machinery in the sugar factory, and placed it under the charge of one of their officers. Thenceforth, the machinery remained in the custody and possession of the Crown authorities, who refused to give delivery, or to allow delivery to be made to any one, until the whole import duties chargeable in respect of the machinery were paid, although they expressed their willingness to give access to the machinery for the purpose of cleaning and preserving it. They alleged that the factory had been duly constituted a customs or bonded warehouse, for the safe-keeping of the machinery, by an Act of the Governor in Council, in terms of the Dominion Customs Act, 40 Vict. c. 10; that the sale, so far as regarded the machinery, was void, inasmuch as it was in the possession of the Crown, and not of the judgment debtors; and, at all events, that so long as it remained in the factory, which had been constituted a warehouse within the meaning of the Customs Act, no sale by the sheriff could defeat the right of the Crown to retain the custody of the machinery until the import duties were paid.

In terms of article 687 of the Procedure Code, the purchaser at a sale by the sheriff in execution is bound to pay the price

within three days. On the lapse of that time, the sheriff, before making his return, addressed a letter to the appellant, requiring him to make payment of the price; and received a reply, through a solicitor, to the effect that the appellant was not prepared to pay, because the sheriff was unable to make delivery to him of the property which he had purchased.

On the 3rd of October, 1882, the appellant presented a petition to the Superior Court, craving that the sheriff's décret of the 28th of August, adjudging the property to him, should be annulled, and the sale declared to be void; or, otherwise, that he should be relieved of his obligation to pay the purchase-money. The respondent company, as judgment creditors, opposed the application; and, on the 4th of October, 1882, they presented a petition for folle enchère to the Superior Court, demanding the issue of a bref de venditioni exponas, under which the property should be resold at the risk of the appellant. In support of his application to annul the sale, the appellant alleged that he had bought the property free of all claims; that the action taken by the customs' authorities had made it impossible for the sheriff to give delivery to him in terms of the contract of sale; and that he could not obtain possession of the machinery without paying the duties claimed by the Crown, which he was under no obligation to do. On the other hand, the respondent company alleged that the Crown had, in point of fact, no right to detain the machinery in order to enforce payment of the customs duties. They also denied that the appellant had demanded from the sheriff delivery of the property which he had purchased, and averred that the appellant had never been willing or ready to pay the price. that nothing had occurred which made it impossible for the sheriff to give delivery, and that he had, all along, been ready and willing to do so.

Mr. Justice Torrance, on the 29th of December, 1882, disposed of both petitions. He held that the sheriff's sale on the 28th of August had purged all privileges and hypothèques upon the property, and that the claim of the Government for customs duties could not interfere with its delivery. Being thus of opinion that no cause had been shewn why the appellant Prévost "should not have possession on paying the price of adjudication," the learned

J. C. 1885

PRÉVOST v. LA COMPAGNIE DE FIVES-LILLE.

judge dismissed his application, with costs, and gave the respondents decree in terms of the prayer of their petition.

Against that judgment Mons. Prévost appealed to the Court of Queen's Bench for Lower Canada. Before the cause was heard, the Attorney-General intervened in the interest of the Crown, and prayed the Court to declare that the machinery at the time of its seizure by the sheriff was in the possession of the customs' authorities, and not of the judgment debtors, and to adjudge and declare that its seizure by the Crown under the bref d'assistance was valid, and that the machinery was in the lawful possession of the Crown for the purpose of holding the same until the duties exigible thereon were paid.

After hearing the original parties to these petitions, and also the intervenor, for their several interests, the Court of Queen's Bench gave judgment upon the 23rd of January, 1883. They held that the Crown was a preferable creditor for the amount of the customs duties payable in respect of the machinery, and, although they were of opinion that there was no error in the judgment of Mr. Justice Torrance, they varied his judgment by directing that the resale at the risk of the appellant should be "sujette au privilège de la Couronne sur les deniers qui représenteront le prix des dites machines." They likewise altered the judgment of the Superior Court, in so far as it related to costs, and recommended, or, in other words, ordered that the whole costs incurred by the appellant Prévost and by the respondent company in both Courts should be paid by the Crown, and should form a preferable charge upon that part of the price which was payable to the Crown in respect of customs duties.

The reasons for the judgment of the Court of Queen's Bench were delivered by Chief Justice Dorion, and are, in substance, the same as the considerations expressed in the judgment of Mr. Justice Torrance. The learned judges seem to have been unanimously of opinion that the sheriff's sale had the effect of purging the machinery of all charges, including the rights of the Crown, and that, as soon as the adjudication to the appellant Prévost was completed, on the 28th of August, 1882, the Crown could only prefer a claim to be ranked in the distribution of the price. Accordingly, they came to the conclusion which is thus

stated by the learned Chief Justice:—"La vente, en ce qui regarde l'appelant est donc valable, et aussitôt qu'il aura payé son prix d'adjudication il pourra se faire mettre en possession des propriétés adjugées; et en refusant de payer son prix, il s'expose à ce que la propriété soit vendue à sa folle enchère, en vertu de l'Art. 600, C. P. C." The reason assigned for their somewhat remarkable order as to costs was, that the Crown had occasioned the litigation by not intervening at an earlier stage of the proceedings.

Their Lordships are of opinion that neither the judgment of the Queen's Bench, nor that of the Superior Court, which was thereby affirmed, with variations, can be sustained. Both judgments are based upon the ground that, because the seizure by the Crown upon the 29th of August, and the subsequent detention of the machinery until payment should be made of the customs duties, were, in the opinion of the learned judges, contrary to law, therefore it was in the power of the appellant Prévost, upon payment of the prix d'adjudication, to put himself in possession of the property sold to him. That is a very startling proposition. The Crown made the seizure of the machinery, and kept possession of it, in virtue of a warrant ex facie regular; and in this appeal, as well as before the Court of Queen's Bench, the Attorney-General for the Dominion has appeared and pleaded that the Crown acted within its legal right in seizing and detaining the machinery until customs duties to an amount exceeding $20,000 were paid. The claim of the Crown might or might not be well founded, but nothing in the present case is more clearly apparent than the fact that the claim was deliberately preferred, and has been seriously insisted in, and that the appellant Prévost, if he had in September, 1882, paid the price of $76,000 to the sheriff, could not have obtained possession of the property which he had purchased, except by paying some $20,000 more, which he was not bound to do, or by entering into a doubtful and, it might be, a protracted litigation with the Crown. The practical result of the judgments in the Courts below is to relieve the seller of any obligation to give delivery of the subjects sold, and to impose upon the purchaser an obligation to pay the price, and thereafter to attain possession, in the best way he can, it may be,

J. C. 1885 PRÉVOST v. LA COMPAGNIE DE FIVES-LILLE.

after expensive litigation, and years after he has parted with the purchase-money. It appears to their Lordships that such a result is inconsistent with the essential principles of the contract of sale, and is not justified by any peculiarity of the Canadian law.

Art. 1591, C. C., declares that, whilst the rules concerning the formalities and proceedings in judicial sales are to be found in the Civil Procedure Code, such sales "are subject to the rules generally applicable to the contract of sale, when these are not inconsistent with special laws or any article of this Code." By Art. 1491, C. C., the principal obligations of the seller, arising out of the contract of sale, are defined to be, "1, the delivery, and, 2, the warranty of the thing sold." By Art. 1492 of the same Code, delivery is declared to be "the transfer of a thing sold into the power and possession of the buyer;" whilst the following article (1493) is to the effect that the obligation of the seller to give delivery is satisfied "when he puts the buyer in actual possession of the thing, or consents to such possession being taken by him, and all hinderances thereto are removed."

These articles of the Civil Code merely lay down certain well-known rules as to delivery, incidental to the contract of sale, which are common to most, if not to all systems of jurisprudence, and these rules are not in the least inconsistent with any of the formalities and proceedings prescribed by the Code of Civil Procedure in the case of judicial sales. Upon the completion of the contract, there immediately arise mutual rights and obligations on the part of the seller and purchaser. When the subject of the sale is an immeuble, the obligation of the seller is to give the purchaser peaceable possession, and also a clear title, to enable him to defend his possession, and it is the right of the seller, upon fulfilment of that obligation, to demand and receive payment of the price. On the other hand, the obligation of the purchaser is to pay the price upon delivery of possession and of a title sufficient to protect him from eviction. Neither of the parties can exact performance from the other, except upon the condition of fulfilling his own part of the contract.

It was urged on behalf of the respondent company that the sale to the appellant was perfected by the adjudication of the sheriff upon the 28th of August, 1882, and that such adjudication

had the legal effect of transferring the property to the appellant, and of giving him, at the same time, an unencumbered title. Now, it is not matter of dispute that the sugar factory buildings and the machinery were sold together as an immeuble, and, that being the case, the argument of the respondent company does not appear to be consistent with article 706 of the Procedure Code, which declares that "no adjudication is perfect until the price is paid, and then it conveys ownership from the time of its date." But assuming that the adjudication did pass the property of the thing sold to the purchaser, that would not, in the opinion of their Lordships, relieve the seller from performance of the legal obligations incumbent upon him, arising out of the completed contract of sale. The respondents' argument upon this part of the case confounded two matters which are essentially distinct, the perfection of the contract and its due performance. If the appellant had bought a mere title there would have been room for the respondents' contention, but the thing exposed to sale by the sheriff and purchased by the appellant was a sugar factory, and the obligation of the seller, under the completed contract of sale and purchase, was to give him actual possession of the factory.

It was also suggested, in the argument for the respondents, that, in the case of a judicial sale, it lay with the purchaser to take judicial proceedings, if these became necessary, for attaining possession of the property sold to him. The suggestion was based on the terms of article 712 of the Procedure Code, which provides that a purchaser, who cannot obtain delivery of the property sold from the judgment debtor, must demand it of the sheriff, and upon the sheriff's return or certificate of the refusal to deliver, may apply to the Court for an order commanding the sheriff to dispossess the debtor, and to put the purchaser in possession. The remedy thus provided is a summary method of ejecting the judgment debtor, whose right and interest in the property has already been extinguished by a series of regular judicial proceedings. It has no analogy to the case of a preferable claim, such as is here asserted by the Crown, coupled with actual possession by the claimant, under a formal legal warrant. A claim of that kind, even assuming that it may ultimately prove

J. C. 1885 PRÉVOST v. LA COMPAGNIE DE FIVES-LILLE.

to be invalid, can only be determined, and possession recovered, by means of a new litigation which may last for years. It would be contrary to well recognised principles of law and equity to hold, and there is no authority to be found, either in the Civil or Procedure Code, for holding that such a hindrance to the purchaser's obtaining possession must, in the case of an ordinary contract of sale, and in the absence of special circumstances, be removed by him, at his own expense, and not by the seller.

Their Lordships do not consider it necessary, for the purposes of this case, to decide any of the questions which have been argued before them, in regard to the right of the Crown, either at common law, or under the provisions of the Dominion Act, 40 Vict. c. 10, to seize and retain possession of the machinery in question. It appears to their Lordships to be quite sufficient for the decision of the case between the original parties to it, that no offer has been made to implement the sale of the 28th of August, 1882, by delivering possession to the purchaser; and that, in point of fact, neither the sheriff nor the respondents have ever been in a position enabling them to give delivery to the appellant, in terms of articles 1491, 1492, and 1493 of the Civil Code.

Accordingly their Lordships will humbly advise Her Majesty to reverse the judgment of the Superior Court, dated the 28th of December, 1882, and also the judgment of the Court of Queen's Bench, dated the 23rd of January, 1884, and to grant the prayer of the appellant's petition to have it declared that he is freed from his obligation to pay the purchase-money, and to dismiss the petition of the respondents for folle enchère, with costs to be paid by the respondents to the appellant of all the proceedings in both Courts, the respondents must also pay to the appellant his costs of this appeal. There will be no order as to the costs of the Crown.

Solicitors for appellant: *Simpson, Hammond, Richards, & Simpson.*

Solicitors for respondent: *G. S. & H. Brandon.*

Solicitors for Attorney-General of Canada: *Bompas, Bischoff, Dodgson, & Coxe.*

[PRIVY COUNCIL.]

McGIBBON . . . . . PLAINTIFF.

AND

ABBOTT AND ANOTHER . . . . . DEFENDANTS.

[J. C.* 1885 June 26, 27 July 18.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, PROVINCE OF QUEBEC.

Will—Construction—Power to apportion amongst a Class includes Power of Exclusion—Illusory Appointments.

Where a testator domiciled in Lower Canada bequeathed a portion of his residuary estate to his executors upon trust to "pay upon the death of his son, the capital thereof to such son's children in such proportion as my said son shall decide by his last will and testament, but in default of such decision then share and share alike as their absolute property for ever":—

Held, that the son had not only the right to apportion the capital between all his children, as well those of his then existing marriage as those of any future marriage, but also the right to dispose of the property in favour of one or more of his children to the exclusion of the others.

The English doctrine as to illusory and unsubstantial appointments under a power is not and never was any part of the old French law or of the law of Lower Canada.

An English will by a testator domiciled in Lower Canada must be interpreted with regard to the law of Lower Canada, and not that of England.

Martin v. *Lee* (14 Moore, P. C. 142) explained.

APPEAL from a decree of the Court of Queen's Bench (May 19, 1884) reversing a decree of the Supreme Court for Lower Canada, district of Montreal (Dec. 13, 1882).

The question submitted in this appeal was whether a person empowered to dispose by will of personal property in favour of his children in such proportion as he shall decide by such will, can, according to the law of the province of Quebec, bequeath the whole of such property to four of his children giving nothing to the fifth.

The facts of the case and the clauses of the will submitted for construction appear in the judgment of their Lordships.

The judgment of the Lower Court, which was in favour of the

* *Present*:—LORD WATSON, LORD MONKSWELL, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

J. C. 1885 McGIBBON v. ABBOTT.

appellant, proceeded on the ground that John Octavius Macrae had merely the power and right to decide in what proportion the fund should be divided among his children, but had no right to exclude any one of his children from the benefit thereof. The Court of Queen's Bench ruled in favour of his having a power of exclusion. The reasons given by the Lower Court were as follows: "The question before us is one of pure construction, and I cannot do better than cite the words of Farwell's Work on Powers, published in 1874. In page 294 we read 'Each case must depend on the intention expressed in the particular instrument creating the power; no general rule can be laid down, except that the words "all and every" are mandatory, and make it necessary that each object should have a share, and that "such" authorizes exclusion, unless a contrary intention appears.' Jessel, M.R., in *In re Veale's Trusts* (1), says: 'I have no doubt that is the law;' looking then at the words employed by the testator, he made the bequest to the children of John Octavius Macrae, which may be regarded as the same as "all" the children, and he did not use the word "such" of the children as John Octavius Macrae might select. *Stolworthy* v. *Sancroft* (2) is in point, and it is approved of by Redfield on Wills, 4th Ed. vol. i., p. 270.

Bompas, Q.C., and *Fullarton*, for the appellant, contended that the judgment of the Lower Court was right. The Court was bound to give effect to the intention of the testator as evidenced by the whole will: *Martin* v. *Lee* (3); and for that purpose to have regard to the meaning of English language and law at the date of the will, which in this case was before 37 & 38 Vict. c. 37. By English law before that Act there would, under the will which created the power, be no right to exclude. The intention here was to benefit all the grandchildren. The donee of the power could apportion the bounty of the testator, but could not select the objects of it: *Stolworthy* v. *Sancroft* (2).

Macnaghten, Q.C., and *Jeune*, for the respondents, contended that the power was validly and properly exercised. The law of

(1) 4 Ch. D. 65. (2) 10 Jur. (N.S.) 762.
(3) 14 Moore, P. C. 142.

J. C.
1885
McGIBBON
v.
ABBOTT.

the province of Quebec on this point is the same as the law of England since 37 & 38 Vict. c. 37. The decisions and rule of construction in regard to illusory appointments affected by that Act had no effect in Canada and did not rightly interpret its law. Besides, the intention of William Macrae, as expressed in his will, was to leave the disposition of the trust fund to John, with the sole limitation that it should not go out of his family. The following authorities were cited: *Spencer* v. *Spencer* (1); *Kemp* v. *Kemp* (2); *Bax* v. *Whitbread* (3); *Butcher* v. *Butcher* (4).

Bompas, Q.C., replied, contending that under the French law applicable to the case, a father cannot appoint to some children under a power and not to others. He cited 1 Du Perier, liv. 3, qu. 2; Arrêts d'Olive, liv. 5, ch. xiv., p. 705; Ricard, tome ii., traité III., ch. xi., pt. 2, Nos. 62, 63; Code Civil of Canada, ss. 165, 168, 169. The law in Pennsylvania is now what the old common law of England was, as opposed to the old rule of English equity: see *Graeff* v. *De Nord* (5). The power would have been duly exercised by giving a small portion.

1885
July 18.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

This is an appeal from a decision of the Court of Queen's Bench for Lower Canada, in the province of Quebec, which reversed a decision of the Superior Court in that province in favour of the plaintiff, who is now the appellant. He sued in the character of tutor aux biens of Humphrey Gordon Eversley Macrae, a minor, whom it will be convenient for the purpose of this judgment to treat as the plaintiff.

It appears that the late William Macrae, who was domiciled in Lower Canada, executed his last will at Montreal on the 3rd of March, 1868, in the English language.

The 12th clause of the will was in the following words:—

"I give and bequeath unto my executors hereinafter named for

(1) 5 Ves. 362. (2) 5 Ves. 849. (3) 16 Ves. 15.
(4) 9 Ves. 382, and 1 V. & B. 89. (5) 44 Penn. 527.

J. C. 1885 McGIBBON v. ABBOTT.

the use, benefit, and behalf of the children issue of the present or any future marriage of my son John Octavius Macrae, one third of the residue and remainder of my estate and succession, to have and to hold the same upon trust; firstly, to invest the proceeds thereof in such securities as to them shall seem sufficient, and from time to time to remove and reinvest the same, and during the life of my said son, John Octavius Macrae, to pay the rents and revenues derived therefrom, to my said son, for his maintenance and support, and for the maintenance and support of his family; and secondly, upon the death of the said John Octavius Macrae, then the capital thereof, to his children in such proportion as my said son shall decide by his last will and testament, but in default of such decision, then share and share alike as their absolute property for ever; and I hereby will and ordain that my said son, John Octavius Macrae, shall have the right to receive the said revenues and profits for his maintenance as aforesaid, without their being subject to seizure for any debts created, or due, or payable by him, but shall be deemed and are hereby declared to have been given as an alimentary provision for his support, and that of his family, and insaisissables."

It will be convenient in this judgment to call the father "William" and the son "John." John was twice married, first in 1859, and secondly on the 20th of November, 1879. He died on the 12th of May, 1881, leaving four children the issue of his first marriage, viz. Lucy Caroline Macrae, now of age and one of the respondents in this case, John Ogilvy Macrae, Ada Beatrice Macrae, Catherine Alice Lennox Macrae, and Humphrey Gordon Eversley Macrae, the plaintiff, the issue of the second marriage, who was born on the 25th of January, 1881, and is the appellant.

John, by his will, dated the 5th April, 1880, directed and appointed that his son, John Ogilvy Macrae, and his three daughters, Lucy Caroline Macrae, Ada Beatrice Macrae, and Catherine Alice Lennox Macrae, should be entitled equally, share and share alike, to the trust fund over which he had a power of appointment under his father's will; and by a subsequent provision of his will he bequeathed to his second wife the usufruct of all of his property beyond the trust fund and the amount comprised in the settlement made on his first marriage, and to all of his children,

including any who might be born after his second marriage, the capital of such other property, share and share alike.

It is evident that the intention of William was to tie up the capital of the share of his son John for the benefit of John's children as a class after his death. William, when he made his will, could not foresee what children John might have at the time of his death, or what might be their respective wants or requirements. He did not, therefore, attempt to specify in what proportion the capital should be divided, but he left that to the decision of his son, who would naturally be better acquainted with the circumstances of his own children. For example, John, during his lifetime, might make advances to some of his children, as it appears from another part of the will the testator himself had done with regard to his own sons George and John, and to his daughter Catherine, and not to others. Some of the children might be otherwise amply provided for, and might need no portion of the property left by their grandfather. It is contended, however, and was contended in the courts below, that John was bound to give some share, however small, to each of his children, and that, according to the intentions of William as expressed by his will, in default of his doing so, all the children were entitled under it to take in equal shares.

The case was heard in the first instance in the Superior Court, when Mr. Justice Torrance decided in accordance with that view of the case.

On appeal to the Court of Queen's Bench, that Court, consisting of Chief Justice Dorion and four other judges, reversed the decision of the Superior Court, and unanimously held that John had not only the right to apportion the capital between all his children, as well those of his then existing marriage as those of any future marriage, but also the right to dispose of the property in favour of one or more of his children to the exclusion of the others, as he had done by will. From that judgment the plaintiff has appealed to Her Majesty in Council, for the following amongst other reasons:—

1. By the law of Lower Canada the Court is bound to give effect to the intention of the testator as evidenced by the whole will: *Martin* v. *Lee* (1).

(1) 14 Moore, P. C. 142.

J. C. 1885 McGIBBON v. ABBOTT.

2. That in the case of a will in the English language and couched in English legal phraseology, it was proper for the Courts of Lower Canada, in accordance with the case of *Martin* v. *Lee* (1), to have regard to the meaning and effect of that phraseology in the English language and law at the date of the will, in order to arrive at the intention of the testator.

3. That at the date of the execution of the will and down to and at the date of the death of the testator, the language of the said will would by the law of England, as it then stood, have given no right to John Octavius Macrae to exclude any of his children, but only to direct the proportions in which they would share.

4. That it appears from the will to have been the intention of the testator to benefit all his said grandchildren, and to give their father a power only to apportion but not to exclude.

5. That there is nothing in the law of Lower Canada opposed to this construction or to this intention.

The reasons of Mr. Justice Ramsay for his judgment in the Court of Appeal are set out in the Supplemental Record, and it appears from a letter from the Clerk of Appeals at Montreal to the registrar of the Privy Council that Mr. Justice Ramsay rendered the unanimous judgment of the Court of Appeal, and that the other judges have no notes, and have not sent any reasons for their concurrence in the judgment.

As to the first reason for the appeal to Her Majesty in Council, there can be no doubt that, according to the law of Lower Canada as well as according to the law of England, "the paramount duty of the Courts" (to use the words of Lord Justice Turner in the case of *Martin* v. *Lee* (2), "is to ascertain and give effect to the intention of a testator to be collected from the whole will, and not from any particular word or expression which may be contained in it." But it is not their duty, by adhering to the strict letter of a will, so to construe general words as in the absence of clear and unambiguous language to impute to a testator an unreasonable intention.

The doctrine of the English Courts of Equity as to illusory or unsubstantial appointments under a power is not, and never was, any part of the old French law or of the law of Lower Canada,

(1) 14 Moore, P. C. 142. (2) 14 Moore, P. C. 153.

nor is it included in any of the articles of chapter 4 of the Civil Code of Canada, relating to substitutions.

The question whether John could exclude any one of his children from a share must, in their Lordships' opinion, be decided according to the law of Lower Canada, and not according to the English law. They do not understand the case of *Martin* v. *Lee* (1) as deciding that a will executed in Lower Canada by a person domiciled in Lower Canada, if written in English, must be interpreted with regard either to moveable or immoveable property in Lower Canada according to the rules of English law, and have the same effect given to the phraseology as if that phraseology had been contained in a will executed in England by a person domiciled in England, or relating to land or other property in England. All that they understand that case to decide is that the word "children," used as it was in the will then to be interpreted, was not intended to have the more extensive meaning which may sometimes be given to the word "enfants" in the old French law. Lord Justice Turner, at p. 154, said, "The true question therefore in this case is not whether the word 'enfants' may include grandchildren and even more remote descendants, but whether upon the true construction of this will it was intended to include them." See also the remarks at pp. 154 and 155.

It could never have been intended by their Lordships to lay down a rule of construction which might render it necessary to apply the rule in *Shelley's case* to a conveyance or devise written in the English language of lands in Lower Canada to a man for life, with a substitution in favour of his heirs upon his death.

The question to be considered is whether, according to the law of Lower Canada, the gift in the will of William, by the words, "and, secondly, upon the death of the said John Octavius Macrae, the capital thereof to his children in such proportion as my son shall decide by his last will and testament," contained an exclusive or non-exclusive power. It may be said that, according to the words taken in their strict grammatical sense, each child was entitled to a share; but it is to be borne in mind that, as the old English rule of equity as to illusory appointments was not in

(1) 14 Moore, P. C. 142.

J. C.
[1885
McGIBBON
v.
ABBOTT.

force in Lower Canada, John, even if the power is to be construed as non-exclusive, might have given a share of one cent each to four of the children, and the whole of the remainder to the other. In other words, that 100,000 dollars, the amount at which the property is valued by the plaintiff, minus four cents, might have been given to one of the children, and one cent, or a share in the proportion of one to ten millions, might have been given to each of the others.

It is to be observed that at the date of his will John had only the four children, amongst whom he thereby decided that the property charged should be divided. His decision at the time was quite in accordance with the will of his father, whatever construction is to be put upon it. He was not bound at that time to make by general words provision for a child who might be afterwards born. He was not bound to make his decision uno flatu (see *Cunninghame* v. *Anstruther* (1)). He might have revoked the will and made a new will, or he might have amended it by a codicil; and all doubt as to the validity of the will which was made before the birth of the plaintiff would have been removed if John had executed a codicil amending his will by giving one cent to the plaintiff, and the remainder to the four children named in the will.

William, if he had pleased, might have provided by express words that each child of John should have a share, and that no share should be less than a certain amount, but he was not prepared to fix the amount of the shares. To hold that when he left to his son to fix the proportion he intended to render it compulsory upon him to give each child a share, though it should only be in the proportion of one to ten millions, would be to impute to him a most unreasonable intention. To do so would violate the rule of interpretation, "Qui hæret in literâ hæret in cortice."

In England, Lord Alvanley, in the case of *Kemp* v. *Kemp* (2), in holding a power to be non-exclusive upon finding a current of authorities against the words being construed as giving an exclusive power, observed:—"My inclination is strong to support the execution of the power if I could consistently with the rules

(1) Law Rep. 2 H. L., Sc. 223. (2) 5 Ves. jun. 861.

I find established;" and on referring to the case of *Burrell* v. *Burrell* (1), in which a testator gave all his real and personal estate to his wife, to the end that she "might give his children such fortunes as she should think proper," remarked:—"Lord Camden, as I conceive, was of opinion that these words were so ample that if she thought fit to give nothing to one she might so execute the power. I am willing to subscribe to that opinion of Lord Camden upon such a doubtful question, being perfectly satisfied that in setting aside these appointments, by criticising the words 'to and amongst,' &c., and the rule as to illusory shares, the Court goes against the intention. I must therefore think that, under the words of that will, Lord Camden thought that the wife might have given the whole to one child, and had a right to exclude any who, in her opinion, did not want it." In the case then before him, Lord Alvanley held that the power was non-exclusive, but at the conclusion of his judgment, having given his reasons at length, he added,—"For these reasons, but with less satisfaction than I have had in any other judgment that I have given, being satisfied that the person creating the power meant a much larger power than I can hold the person executing it had, I must declare the appointment void."

In Sugden on Powers it is said, "In many cases an exclusive appointment may be authorized by the apparent intention of the donor, although no words of exclusion are expressly used. Thus, he says, in *Bevil* v. *Rich* (2), the testator gave all the rest of his estate to A. B. in trust, 'to give my children and grandchildren according to their demerits.' A. B. gave the estate to one, excluding the rest. Lord Nottingham refused to set aside the appointment, as the children were to come in by the act of the devisee, and he was to give or distribute according to their demerits, therefore he was to judge." So in the present case John was charged with the fiduciary substitution and was to decide.

It was contended in the argument at the bar that John could not properly decide with reference to the plaintiff without considering his case, and that as his will was executed before the plaintiff was born he must have decided without considering.

(1) Amb. 660. (2) 1 Ch. Cas. 309.

J. C. 1885 McGIBBON v. ABBOTT.

This is not so. He had the power to revoke or alter his will, and if he had thought that the plaintiff ought to have a substantially proportionate share, or even a nominal share, he could have decided in his favour by a codicil. In Domat's Civil Law, part 2, book 5, tit. 3, sec. 3, par. 9, it is said, and with very good reason, "If he who was charged with a fiduciary bequest or substitution at the time of his death in favour of some one of his children whom he should think fit to choose, has given in his lifetime, to one of his children, the things which were subject to the fiduciary trust, this donation would be in the place of an election if the same were not revoked. For although the liberty of this choice ought to last until the time of the death of the person charged with the fiduciary substitution, and it was for the interests of all the children that the said donation should not destroy the said liberty, yet it would be sufficient that the donee had been made choice of, and that the said choice had not been revoked; seeing the choice would be confirmed by the will of him who, having it in his power to make another choice, had not done so. So it would be the same thing as if the choice had been made at the time of his death."

The Courts in Lower Canada are not bound by the current of decisions in England, as the Judges in England before 1874, and Lord Alvanley in the case of *Kemp* v. *Kemp* (1), considered themselves to be bound in deciding whether a power was exclusive or non-exclusive. Even in England those decisions had caused so much inconvenience that it was found necessary to resort to legislation upon the subject, and the law was amended by Act 37 & 38 Vict. c. 37.

A similar Act was not necessary in Lower Canada. The Courts there were not trammelled by the current of authorities to which Lord Alvanley and other judges in England were forced to yield.

Judge Ramsay, in his written reasons, says, and says with some force, speaking of the law of England before 1874, "It is only by the help of repeated legislation that the law there has come down to that reason from which I apprehend our law starts. It was therefore quite unnecessary for us to make any Act similar to the English Act 37 & 38 Vict. c. 37."

(1) 5 Ves. jun. 861.

Mr. Justice Ramsay also, in his reasons, states that, "Under the Roman law and under the old régime of France there was a great question as to the effect of the substitution of the children or of a class, as for instance the relations, and that at last it seems to have been determined that when the children of the Grèvé were called nominatim they held of the original testator, and that the father could not affect the disposition; but that when the children were called collectively, there was a difference of opinion as to whether the father could select among the children so as to give to some and exclude others." He adds, "Although the affirmative of the proposition cannot be supported on a strictly legal argument, it seems to have prevailed." He then cites some authorities in support of his argument.

Their Lordships are not prepared to say that that exposition of the law is not correct. If, then, a man to whom an estate is given for life, charged with a substitution in favour of his children after his death, can substitute one or more of his children to the exclusion of others, the addition of the words in the present case, "in such proportion as he shall decide," does not affect the nature or substance of the substitution. It only gives power to the father to do that which he could have done under the general words of the substitution in favour of his children.

It would be lamentable if their Lordships, in a case arising in Lower Canada and to be determined by the law of that country, should feel themselves bound by a course of English decisions which have been swept away by the legislature as fraught with inconvenience and mischief, and thus be driven to such a construction of the will of William as would form a precedent in future cases of a similar nature, and thereby introduce into Lower Canada all those difficulties and inconveniences which it required the force of an Act of Parliament in England to remove. In their Lordships' opinion the decision of the Court of Queen's Bench is correct. They will therefore humbly advise her Majesty to affirm the judgment of that Court.

The appellant must pay the costs of this appeal.

Solicitors for appellant: *Bompas, Bischoff, Dodgson, & Coxe.*
Solicitors for respondents: *G. L. P. Eyre & Co.*

[PRIVY COUNCIL.]

J. C.* 1885 June 3, 4, 5; July 4.

CARTER . . . . . Appellant;

AND

MOLSON . . . . . Respondent.

HOLMES AND ANOTHER . . . . . Appellants.

AND

CARTER . . . . . Respondent.

FOUR APPEALS CONSOLIDATED.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, PROVINCE OF QUEBEC.

Law of Lower Canada—Mortgagor and Mortgagee—Notice—Right of Intervention—Sect. 154 *of Civil Procedure Code.*

Where a registered deed referred to and by reference incorporated certain other transfers and agreements whereby it appeared that the deed, though professedly one of sale, was in substance and reality the transfer to the ostensible purchaser of an estate which had been specifically allotted to him as part of his share of the residue under his father's will; *held* that a mortgagee from the said purchaser must be treated as having full knowledge that the property was by the will grèvé de substitutions in favour of the mortgagor's wife and family, his usufruct being not arrestable for his debts, especially as the mortgagee's agent was personally cognizant of the transfers and agreements of which the deed gave notice.

Certain rents and dividends of the said mortgagor having been attached, *held* that under sect. 154 of the Civil Procedure Code those who were only entitled under the will to the corpus of the property and the shares had no right to intervene in a proceeding between the mortgagor and mortgagee to declare such rents and dividends insaisissables during the mortgagor's life.

APPEALS from judgments of the Court of Queen's Bench (March 24, 1883).

The questions at issue were whether the attachment by the plaintiff Carter of certain rents and dividends in part satisfaction of a judgment obtained by him was good as against the defendant Molson and the other parties to the appeal. These latter

* *Present*:—Lord Watson, Sir Barnes Peacock, Sir Richard Couch, and Sir Arthur Hobhouse.

contended that the said dividends did not belong to the defendant, and that the whole of the property sought to be attached was protected from seizure by the provisions of Canadian law, expressed in Article 558 of the Code of Civil Procedure for Lower Canada:—"The following are also exempt from seizure—(3.) Sums of money, or objects given or bequeathed upon the condition of their being exempt from seizure; (4.) Sums of money, or pensions given as aliment, even though the donor or testator has not expressly declared that they should be exempt from seizure." Article 632 also provides that: "No seizure can be made of immoveables declared by the donor or testator thereof, or by law, to be exempt from seizure."

The facts of the case and the mode in which these questions were raised appear in the judgment of their Lordships.

Davey, Q.C., and *Gibbs*, Q.C. (*Deane* with them), for the appellant Carter, contended that he was entitled to rely on the deed of the 15th of June, 1871, as a registered deed of sale, vesting the property in Molson absolutely, and that there was no proof of any prior adverse title duly registered. Besides, Molson was estopped by his own mortgage deed from denying that the land belonged to him. The effect of the arrangements made by the trustees in dividing the residue of John Molson's estate was that the land in question was taken out of the residue, and the net proceeds of sale substituted in its place as subject to the substitutions created by the will. Carter had no notice at the time of the mortgage of any adverse title. The registration of the will was not sufficient to indicate substitution: Civil Code, 938, 939, 940, 942; there should have been registration of the substitution shewing who was the substitute. As regards the dividends they are not proved to come within the substitution created by the will. Those who claim by substitution cannot do more than defend the corpus of the property—they have nothing to do with either rent or dividends: sect. 154 of Civil Procedure Code. If these latter are not seizable Molson alone has the right to complain.

Kenelm Digby, and *F. F. Daldy*, for the respondents, contended that the deed of the 15th of June, 1871, did not vest the land

J. C. 1885 CARTER v. MOLSON. HOLMES v. CARTER.

in Molson as vendee, but operated only as a partition and not as a sale: see Civil Code, 746, 747, 968. It was not in execution of a power of sale given by the will, but it was a partition under the will, and accordingly the land and rents are still protected from seizure and burdened with substitutions by the will. Reference was made to Pothier, Traité des Donations Testamentaires, No. 212, ch. v., art. 2; Civil Code, 905 *et seq.*, 918, 921. [*Davey* referred to art. 869.] *Courteaux* v. *Hewetson* (1), which contains a good summary of the law as to whether a transaction is a partition or a sale. This is not a proceeding upon the mortgage deed, and no estoppel can be founded on that deed: *Carpenter* v. *Buller* (2). The deed of the 15th of June itself, by reference to the contemporaneous deed and the will of John Molson, afforded notice to a purchaser that it was not a deed of sale; and, besides, the appellant had actual notice through his agent, Mr. Abbott, who negotiated the mortgage.

With regard to the bank shares the onus was on the plaintiff to shew that they were the absolute property of Molson. On the evidence, however, it appears that they were not; at all events the burden of proof is on Carter, and he has not discharged it: Civil Procedure Code, 612, 616, 617, 619, 621, and 626. They were part of the property comprised in John Molson's will, and as such were protected from seizure: see *In re Hackett's Estate* (3). The other parties to the appeal had an interest in the event of the impending suit within the meaning of Civil Procedure Code, 154, which entitled them to intervene: Dalloz, Jurisprudence, vo. Intervention; Merlin, vo. Intervention.

Davey, Q.C., replied.

1885 *July* 4.

The judgment of their Lordships was delivered by

LORD WATSON:—

On the 9th of February, 1875, John Thorold Carter advanced $30,000 upon a mortgage, by which the borrower, Alexander Molson, became bound to repay that sum in six years, and also to pay interest, half yearly, at the rate of 7½ per cent. per

(1) Law Rep. 6 P. C. 407. (2) 8 M. & W. 209.
(3) 13 Ch. D. 696, 726.

annum; and, in security for the due payment of principal and interest, mortgaged and hypothecated a lot of ground and a tenement erected thereon, situated in St. James Street, Montreal. Thereafter, on the 17th of April, 1877, in consequence of default in payment of interest, Carter recovered judgment in the Court of Queen's Bench against Molson, founded on his personal covenant in the deed of mortgage, for $31,125, being the amount of principal and interest due on the 1st of January, 1877. In virtue of that judgment, Carter proceeded to attach, by writ of saisie-arrêt, the rents of the mortgaged property in St. James Street, which had been let to one Allan Freeman, and also the dividends which had accrued or might accrue upon 148 shares of the stock of Molson's bank, which stood in the books of the bank, in the name of Alexander Molson, in trust for Eliza A. Molson et al.

The right of his creditor to attach these rents and dividends was contested by Alexander Molson, upon the allegation that the St. James Street property, as well as the bank stock, formed part of his one-fifth share of the residue of the estate of his late father, John Molson; that, by the will of the deceased, his right to both was, grèvé de substitutions, in favour of his wife and family, and his usufruct was expressly declared to be legs d'aliment, and not arrestable for his debts. In the course of the litigation which followed, two separate petitions were presented for leave to intervene, the one by Eliza Ann Holmes, wife of the debtor, in her own right, and the other by the same lady as tutrix ad hoc to their minor children, along with their daughter Elizabeth, who had attained majority.

In the Superior Court, Mr. Justice Papineau, upon the 30th of June, 1881, rejected the contestation of the judgment debtor, with costs, and sustained the right of the arresting creditor, both as to rents and dividends; and, at the same time, in both applications for intervention the learned judge decided, with costs, against the petitioners. The Court of Queen's Bench, upon the appeal of Alexander Molson, by their judgment rendered on the 24th of March, 1883, in substance affirmed the decision of Mr. Justice Papineau, so far as concerned the dividends, which they declared to have been validly arrested in the hands of the bank; but reversed his decision, in so far as it related to the

J. C. 1885 CARTER v. MOLSON. HOLMES v. CARTER.

rents of the St. James Street property, and quashed the attachment made in the hands of Allan Freeman. The debtor was condemned to pay to the arresting creditor the costs of the contestation with regard to the bank dividends in the court below; whilst the creditor was condemned to pay to his debtor the costs of the contestation in the court below with regard to rents, as well as the costs of the appeal. By a separate judgment of the 24th of March, 1883, the Court of Queen's Bench, in the appeals taken by the intervening petitioners, rejected their contestation, and confirmed the decisions of Mr. Justice Papineau, with costs.

Against these judgments four separate appeals have been presented to Her Majesty in Council. Mr. Carter complains of the decision of the Queen's Bench, in so far as it reverses the judgment of the Superior Court and quashes his arrestment of the rents of the St. James Street property; Alexander Molson complains of decisions of the Courts below sustaining the writ of saisie-arrêt as regards dividends arising upon the 148 bank shares; and the intervening petitioners complain of the decision by which their respective contestations have been rejected. These appeals have been consolidated, and heard as one cause, but must now be separately disposed of, inasmuch as they do not depend upon the same considerations either of fact or law.

To begin with the rents of the St. James Street property. It was argued for the appellant Carter that there has been no deed or document registered which constitutes a legal act of substitution, or, in other words, discloses the fact that the title of his debtor to that property is derived by testamentary gift from his father, the late John Molson, and is therefore affected by the conditions and limitations appearing in the will of the deceased. It was said that, ex facie of the register, the property is vested in Alexander Molson, not as a legatee, but as a purchaser for value from the administrators of his father's will; and, consequently, that the appellant, an onerous creditor who advanced his money on the faith of the register, is not affected by the latent conditions of the will. It was also maintained for this appellant that, inasmuch as, by the deed of mortgage of February, 1875, Alexander Molson declared that the property well and truly belonged to him, he is now estopped from alleging, in this

suit, that it is in reality held by him as an integral part of his share of his father's succession.

In the argument addressed to their Lordships from both sides of the bar, it was conceded that the substitution imposed by the 13th article of John Molson's will upon the share of Alexander Molson, in favour of his widow and issue, cannot receive effect against a creditor in the position of the appellant, unless the substitution be duly registered (C. C., sects. 938, 939), so as to give him due notice of the interests of the substitutes. Mr. Justice Papineau decided this branch of the case against the judgment debtor, upon the assumption that the will of John Molson had not been registered. That assumption seems to have been based upon a somewhat strict and technical interpretation of an answer made for Alexander Molson to the 13th interrogatory contained in the articulation of facts filed for the appellant on the 16th of March, 1879. There is ample evidence to shew that the will was, in point of fact, duly registered in November, 1860; and having regard to the very inartificial and ambiguous character of the interrogatory in question, their Lordships do not hesitate to agree with the Court of Queen's Bench in holding that the registration of the will has been sufficiently established.

In February, 1875, when the appellant lent his money to Alexander Molson, there were already two deeds on the register, evidencing the title by which the borrower held the St. James Street property. The one of these was the will of John Molson already referred to, and the other was a deed, dated the 15th of June, 1871, and registered the 11th of June, 1872, by which William Molson, and the judgment debtor Alexander Molson, as acting executors and trustees under the will, sold, assigned, and transferred that property to the said Alexander Molson. It does not appear to their Lordships to admit of dispute that all persons who transacted with Alexander Molson on the faith of his being the owner of the St. James Street property were bound to inform themselves of, and must be held to have known, the tenor of these two deeds, because the deed of the 15th of June, 1871, constituted Alexander Molson's immediate and only title to the property, and it sets forth, in gremio, that his authors held the

J. C. 1885 CARTER v. MOLSON. HOLMES v. CARTER.

property under the trusts of John Molson's will, and had transferred it to Alexander Molson by virtue of a power of sale said to be contained in the will. Accordingly, if it be the case (as the Court of Queen's Bench have held), that the deed of June, 1871, though professing to give effect to a transaction of sale, was in reality a conveyance to Alexander Molson of that which had been allotted to him as part of his fifth share of the residue of his father's estate, and that the terms of the registered deeds were sufficient to notify that fact to the appellant, or to put him upon his inquiry in regard to it, it seems to follow that he cannot prevail in this appeal. In that case, the property would be identified, on the face of Alexander Molson's title, with his share of residue under his father's will; and every person dealing with him on the faith of that title would either have the knowledge, or the means of informing himself, that the property, as part of that share of residue, was grèvé de substitutions in favour of Alexander Molson's wife and children, and that his usufructuary interest was not arrestable.

The evidence adduced in the Superior Court establishes, beyond all doubt, that there never was any contract, between Alexander Molson and the administrators of his father's will (of whom he was one), for the purchase and sale of the St. James Street property. The property was, no doubt, exposed to public auction, along with other heritable subjects forming part of the residue, and the whole subjects so exposed were knocked down to two gentlemen, other than Alexander Molson, who each represented beneficiaries entitled to one fifth of residue. But these gentlemen were merely nominal purchasers. The auction sale was not resorted to for the purpose of selling and dividing the proceeds,—the only purpose for which a sale was authorized by the will,—but for the purpose of ascertaining the value of the subjects exposed, in order to their partition among three of the five residuary legatees. Accordingly these legatees, after the auction sale, at which Alexander Molson was not a buyer, agreed to divide the subjects which had been exposed, not according to the prices at which they had been knocked down, but according to an estimate based on an average of these prices. Upon that footing, the St. James Street property was allotted to Alexander

Molson, as part of his share; and there appears to be no ground whatever for supposing that the trustees of the will thereafter sold to him his allotted portion for the amount of the estimate, even if such a sale had been within their power, which it clearly was not.

The deed of the 15th of June, 1871, purports to be a conveyance of the property in question to Alexander Molson, in pursuance of a contract by which the trustees of his father's will had sold it to him for the amount at which its value was estimated for the purpose of partition, as already explained. In point of fact, the deed appears to have been framed by the grantors in flagrant disregard of their duty as trustees, and to have been a colourable and not very creditable device for giving Alexander Molson a larger interest in the property than he was entitled to, and for defeating the intentions of the testator with respect to substitutions and the insaissibilité of his son's usufruct. Although that is proved, in the estimation of their Lordships, to have been the true nature of the deed of the 15th of June, 1871, it does not follow that the conditions of John Molson's will could be held to affect the property in a question with any onerous creditor of Alexander Molson, to whom the deed itself gave no notice, and who had no knowledge otherwise of its real character. But the deed of June, 1871, refers to, and by reference incorporates, certain deeds of transfer and agreement executed by the executors and trustees of the will of John Molson, for the purpose of vesting his share of residue in Alexander Molson, and one of these deeds, dated the 15th of June, 1871, appears to their Lordships to indicate very plainly that the St. James Street property had not been sold for the purpose of dividing the price, but had been allotted to Alexander Molson as part of the corpus of his share of residue. At all events, the terms of that deed, and its relative schedules, appear to their Lordships to be quite sufficient to notify to any person dealing with Alexander Molson, on the faith of the deed dated the 15th of June, 1871, and registered the 11th of June, 1872, that the transaction which it professes to embody was, in reality, either a legal partition or an illegal sale.

It is, however, hardly necessary, for the purposes of this appeal,

J. C. 1885 CARTER v. MOLSON. HOLMES v. CARTER.

to determine what would have been the effect of these indications of the true character of the so-called deed of sale, derivable from its own terms, upon the rights of a creditor of Alexander Molson, who had no information except that which he had obtained, or might have obtained, through the register. The appellant, Mr. Carter, does not occupy that position. His agent in negotiating and carrying through the loan transaction of the 9th of February, 1875, was the Hon. J. J. C. Abbot, who is proved to have been cognizant of the whole proceedings in the distribution of the residue of John Molson's estate, and to have taken an active part in advising and completing the arrangements by which his fifth share, including the St. James Street property, was transferred to Alexander Molson. The appellant is affected by the knowledge of the agent to whom he confided the duty of attending to his interests, and that knowledge was amply sufficient to inform its possessor that the deed conveying the St. James Street property to Alexander Molson, though professedly a deed of sale, was in substance and reality the transfer of an estate which had been specifically allotted to him as part of his share of residue. In these circumstances, their Lordships are of opinion that the appellant Carter must be treated as having full knowledge that the property was vested in his debtor subject to all the conditions and limitations imposed by the will of John Molson.

Next, as to the appeal of Alexander Molson with regard to bank dividends. The writ of saisie-arrêt has only been sustained as an attachment of the dividends which may become payable to Alexander Molson in respect of the 148 shares in question. The sole ground upon which these dividends are said to be placed beyond the diligence of his creditors is, that the 148 shares either are, or represent, part of 640 shares of the stock of Molson's Bank which were transferred to Alexander Molson, as an integral portion of the fifth share of residue, settled upon him and his wife and family by his father's will. Their Lordships see no reason to differ from the law laid down by Dorion, C.J., to the effect that these dividends would be protected from arrestment by the 18th article of John Molson's will, if it were proved to be the fact that the 148 shares form part of the 640 shares originally transferred to Alexander Molson by the executors of the will, or were pur-

chased with the proceeds of these original shares. Accordingly the only question requiring to be decided, in this appeal, is one of fact. Their Lordships are willing to assume (although it is unnecessary to decide) that the onus of proving that these 148 shares neither are nor represent any part of the residue of John Molson's estate lies upon the arresting creditor. He has proved, by clear and satisfactory evidence, that, at and prior to the 12th of May, 1873, Alexander Molson had divested himself of the whole of the 640 shares which had been transferred to him, in 1871, by his father's executors; and that 115 of the 148 shares in question never belonged to his father's estate, having been vested in Alexander Molson before the residue was divided. That evidence, in the opinion of their Lordships, not only establishes the right of Mr. Carter to attach the dividends arising upon these 115 shares, but throws upon the appellant, Alexander Molson, the onus of shewing that the remaining thirty-three shares were either part of or purchased with the proceeds of the 640 shares, neither of which facts has he made any attempt to prove.

Then as to the appeals presented by the intervening petitioners. Both of these depend upon precisely the same considerations, and may be disposed of as if they were one appeal. The petitioners have not, and do not assert that they have, any direct or legal interest, either in the rents of the St. James Street property, or in the dividends on the 148 bank shares, which may accrue and become payable to Alexander Molson during his lifetime. On the other hand, it is not disputed that they have material interests, entitling them to resist any attachment of the corpus of the property or of the shares, at the instance of a creditor of Alexander Molson, which might have the effect of defeating their right as substitutes, in the event of Alexander Molson's death. They do not, however, allege that the writ of saisie-arrêt will attach either the corpus of the 148 bank shares, or the dividends accruing upon them, after the death of Alexander Molson. All that they do allege is, that these shares, as part of the residue of his estate, are subject to the substitution in their favour contained in John Molson's will, and that the dividends payable to the institute are, in terms of that will, not arrestable. The only interest in respect of which their right to intervene in

J. C. 1885 CARTER v. MOLSON. HOLMES v. CARTER.

the present litigation is maintained, is the apprehension that some points may be incidentally decided, between the arresting creditor and Alexander Molson, which may prejudice their rights at some future time. It is not said that any judgment in this suit can possibly enable the creditor to attach the estates which they may eventually take, assuming the substitutions in their favour to be valid; nor is it suggested that anything decided in this suit, between the judgment debtor and creditor, with regard to the validity of these substitutions would be binding upon them as res judicata. What they do plead is that such a decision might afford an objectionable precedent, if and when they require to assert their rights judicially, and, consequently, that they have the right to intervene. That plea appears to their Lordships to be untenable. Sect. 154 of the Procedure Code, which regulates this matter, gives the right of intervention to parties who are "interested in the event of a pending suit." The event of the suit can only refer to the operative decree which may ultimately be given in favour of one or other of the parties to it, and not to the views of fact or law which may influence the Court in giving decree. To admit the appellant's plea would involve the admission of a right to intervene on the part of every person who had an interest in preventing a decision being given inter alios, which might be cited as an authority against him in some other suit. Sect. 154 appears to have been framed for the very purpose of limiting the right of intervention to those persons who can shew that a final judgment may possibly be obtained in the suit, which will enable the party who obtains it to possess himself of their estate, or otherwise to impair their legal rights.

Their Lordships are accordingly of opinion that the judgments appealed from ought to be affirmed, and they will humbly advise Her Majesty to that effect. There will be no order as to the costs of any of these appeals.

Solicitors for Carter: *Wilde, Berger, & Moore.*
Solicitors for Molson and Holmes: *Freeman & Bothamley.*

Referred to. CHENARD v. ARISSOL. [1949] A. C. 127

[PRIVY COUNCIL.]

RIEL . . . . . APPELLANT; J. C.* 1885

AND

THE QUEEN . . . . . RESPONDENT. *Oct.* 21, 22.

Ex parte RIEL.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FROM THE PROVINCE OF MANITOBA.

Practice—Leave to appeal in Criminal Cases—Validity of 43 *Vict. c.* 25 *(Canada).*

The rule of the Judicial Committee is not to grant leave to appeal in criminal cases except where some clear departure from the requirements of justice is alleged to have taken place.

Held, that 34 & 35 Vict. c. 28, which authorizes the Parliament of Canada to provide for "the administration, peace, order, and good government of any territory not for the time being included in any province" vests in that Parliament the utmost discretion of enactment for the attainment of those objects. Accordingly Canadian Act 43 Vict. c. 25, is intrà vires the legislature.

Sect. 76, sub-sect. 7, which prescribes that full notes of evidence be taken is literally complied with when those notes are taken in shorthand.

IN July, 1885, the petitioner was tried for the crime of treason before a stipendiary magistrate and a justice of the peace, with the intervention of a jury of six persons, in the North-West Territories of the Dominion of Canada, and having been found guilty was sentenced to death.

The Court of Queen's Bench for the province of Manitoba in appeal confirmed the sentence.

The petitioner applied for special leave to appeal on the grounds, as stated in his petition, that the stipendiary magistrate and justice had no jurisdiction to try him for treason; if they had there were errors in procedure which vitiated the trial: viz., there was no indictment preferred by a grand jury, no coroner's inquisition, the evidence was not taken down in writing as required by statute.

* *Present*:—THE LORD CHANCELLOR (LORD HALSBURY), LORD FITZGERALD, LORD MONKSWELL, LORD HOBHOUSE, LORD ESHER, and SIR BARNES PEACOCK.

J. C. 1885 RIEL v. THE QUEEN.

Bigham, Q.C. (*Jeune*, and *Fitzpatrick*, of the Canadian Bar, with him), for the petitioner, contended that leave ought to be granted. A substantial question of law arose, whether the Court of first instance had jurisdiction to try the prisoner in the way it did. After referring to the British North America Act, 1867, ss. 17, 18, 58, 69, 91, and 92, and especially sub-sect. 27 of the latter section, as shewing the powers of the Dominion Parliament and provincial governments and legislatures; sect. 146; sect. 129; 31 & 32 Vict. c. 105; Canadian Acts, 32 & 33 Vict. c. 3, and 33 Vict. c. 3; Imperial Act, 34 & 35 Vict. c. 28 (British North America Act, 1871), s. 4, it was observed that the offence and trial were not in Manitoba, but in the North-West Territory, which became part of the Dominion under the Act of 1871; and that the petitioner was consequently tried under 43 Vict. c. 25 (Canada), s. 76 being the important section. The sub-sections do not give jurisdiction; if they purport so to do they are ultrà vires of the legislature. Treason is in a peculiar manner an offence against the State, and the Imperial Parliament could not have intended that the Dominion Parliament should legislate upon it to the extent of altering the statutory rights of a man put upon his trial regarding it. The petitioner is entitled to all the rights which he possessed under English law unless they have been specifically taken away. He possesses statutory rights under 7 & 8 Will. 3, c. 3 to a trial before a judge and by a jury of twelve, with a right of challenging thirty-five. The Dominion Parliament under the British North America Act, 1871, s. 4, has no power to take away those rights, and render him liable to be tried before two magistrates and a jury of six, with a right of challenging six. The Act relied upon was not necessary for peace, order, and good conduct.

[SIR BARNES PEACOCK:—The same words occur in the Act under which the Indian Penal Code and Code of Criminal Procedure were passed and authorized those Acts.]

Reference was then made to sub-sect. 7 of sect. 76 of the Act of 1880, and objection was made that the evidence was taken in shorthand, not legible to any one but a particular person. It was not writing within the meaning of the section.

[LORD HALSBURY, L.C.:—Is there any authority for appeal in criminal cases?]

Reg. v. *Murphy* (1); *Reg.* v. *Bertrand* (2); *Reg.* v. *Coote* (3).

The Attorney-General (Sir *Richard Webster*, Q.C.), *R. S. Wright*, and *Danckwerts*, for the Crown, were not called upon.

Burbidge, Q.C. (the Canadian Deputy-Minister of Justice), represented the Government of Canada.

The judgment of their Lordships was delivered by

LORD HALSBURY, L.C.:—

This is a petition of Louis Riel, tried in July last at Regina, in the North-West Territories of Canada, and convicted of high treason, and sentenced to death, for leave to appeal against an order of the Queen's Bench of Manitoba, confirming that conviction.

It is the usual rule of this Committee not to grant leave to appeal in criminal cases, except where some clear departure from the requirements of justice is alleged to have taken place. Whether in this case the prerogative to grant an appeal still exists, as their Lordships have not heard that question argued, they desire neither to affirm nor to deny, but they are clearly of opinion that in this case leave should not be given. The petitioner was tried under the provisions of an Act passed by the Canadian legislature, providing for the administration of criminal justice for those portions of the North-West Territory of Canada in which the offence charged against the petitioner is alleged to have been committed. No question has been raised that the facts as alleged were not proved to have taken place, nor was it denied before the original tribunal, or before the Court of Appeal in Manitoba, that the acts attributed to the petitioner amounted to the crime of high treason.

The defence upon the facts sought to be established before the jury was, that the petitioner was not responsible for his acts by reason of mental infirmity. The jury before whom the petitioner

(1) Law Rep. 2 P. C. 535. (2) Law Rep. 1 P. C. 520.
(3) Law Rep. 4 P. C. 599.

J. C. 1885 RIEL v. THE QUEEN.

was tried negatived that defence, and no argument has been presented to their Lordships directed to shew that that finding was otherwise than correct. Of the objections raised on the face of the petition two points only seem to be capable of plausible or, indeed, intelligible expression, and they have been urged before their Lordships with as much force as was possible, and as fully and completely in their Lordships' opinion as it would have been if leave to appeal had been granted, and they have been dealt with by the judgments of the Court of Appeal in Manitoba with a patience, learning, and ability that leaves very little to be said upon them.

The first point is that the Act itself under which the petitioner was tried was ultrà vires the Dominion Parliament to enact. That parliament derived its authority for the passing of that statute from the imperial statute, 34 & 35 Vict. c. 28, which enacted that the parliament of Canada may from time to time make provision for the administration, peace, order, and good government of any territory not for the time being included in any province. It is not denied that the place in question was one in respect of which the parliament of Canada was authorized to make such provision, but it appears to be suggested that any provision differing from the provisions which in this country have been made for administration, peace, order, and good government cannot, as matters of law, be provisions for peace, order, and good government in the territories to which the statute relates, and further that, if a Court of law should come to the conclusion that a particular enactment was not calculated as matter of fact and policy to secure peace, order, and good government, that they would be entitled to regard any statute directed to those objects, but which a Court should think likely to fail of that effect, as ultrà vires and beyond the competency of the Dominion Parliament to enact.

Their Lordships are of opinion that there is not the least colour for such a contention. The words of the statute are apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to. They are words under which the widest departure from criminal procedure as it is known and practised in this country have been authorized in Her Majesty's Indian empire.

Forms of procedure unknown to the English common law have there been established and acted upon, and to throw the least doubt upon the validity of powers conveyed by those words would be of widely mischievous consequence. There was indeed a contention upon the construction of the Canadian statute, 43 Vict. c. 25, that high treason was not included in the words "any other crimes," but it is too clear for argument, even without the assistance afforded by the 10th sub-section, that the Dominion legislature contemplated high treason as comprehended within the language employed.

The second point suggested assumes the validity of the Act, but is founded upon the assumption that the Act has not been complied with. By the 7th sub-section of the 76th section it is provided that the magistrate shall take or cause to be taken in writing full notes of the evidence and other proceedings thereat, and it is suggested that this provision has not been complied with, because, though no complaint is made of inaccuracy or mistake, it is said that the notes were taken by a shorthand writer under the authority of the magistrate, and by a subsequent process extended into ordinary writing intelligible to all. Their Lordships desire to express no opinion what would have been the effect if the provision of the statute had not been complied with, because it is unnecessary to consider whether the provision is directory only, or whether the failure to comply with it would be ground for error, inasmuch as they are of opinion that the taking full notes of the evidence in shorthand was a causing to be taken in writing full notes of the evidence, and a literal compliance therefore with the statute.

Their Lordships will, therefore, humbly advise Her Majesty that leave should not be granted to prosecute this appeal.

Solicitors for Appellant: *Ingledew, Ince & Colt.*
Solicitors for the Crown: *The Treasury.*

[HOUSE OF LORDS.]

H. L. (E.) 1885 June 15.

HENRY MUNSTER . . . . . APPELLANT;

AND

RICHARD COBDEN COX . . . . . RESPONDENT.

Practice—Action against Partner in Name of Firm—Appearance by one Partner only—Judgment by consent against Partner appearing instead of against Firm—Application to issue Execution against the other Partner—Amendment of Judgment— Order XII. *r.* 12, *Order* XLII. *r.* 8, *Order* LIX. *r.* 2, *of the Rules in force before* 1883.

To a writ issued against R. & Co., and claiming damages for libel, an appearance was entered for "R. trading as R. & Co. the defendant in this action." The statement of claim was delivered against "R. sued as R. & Co." and the proceedings continued in that form down to judgment. At the trial by consent a verdict was found for the plaintiff for 40*s.* and judgment entered accordingly. After issuing execution against R. the plaintiff, under the Rules in force before 1883, took out a summons for liberty to amend the judgment (and the pleadings if necessary) by striking the words "R. sued as" from the title of the action; to enter judgment against R. & Co. so as to correspond with the writ, and to issue execution against C., on the ground that C. had been since discovered to be a partner in the firm:—

Held, affirming the decision of the Court of Appeal, that the proceedings having been conducted against R. only, and judgment having been signed by consent against him alone, the judgment could not be converted into a judgment against the firm.

APPEAL from an order of the Court of Appeal (1).

In February 1882 the appellant issued a writ against "R. J. Railton & Co. defendants," claiming damages for libel. An appearance was entered for "Richard Johnson Railton (trading as R. J. Railton & Co.) the defendant in this action." The statement of claim was entitled between the plaintiff and "Richard Johnson Railton (sued as R. J. Railton & Co.) defendants," and under that title the proceedings continued until the trial. After three days hearing before Hawkins J. and a special jury, a verdict was on the 24th of June 1882 by consent found and entered for the plaintiff for 40*s.*, with costs to be taxed as between solicitor and client, and judgment was entered accordingly.

(1) *Munster* v. *Railton*, 11 Q. B. D. 435.

In March 1883 the plaintiff took out a summons for liberty to amend the judgment (and the pleadings if necessary) by striking out the words "R. J. Railton sued as" from the title of the action, and that the judgment might be entered against R. J. Railton & Co., so as to make the record correspond with the writ of summons; and that thereupon the plaintiff might be at liberty to issue execution upon such judgment against Richard Cobden Cox, a partner in the said firm of R. J. Railton & Co.

The summons was dismissed by Master Kaye, whose decision was affirmed by Hawkins J. On appeal the Divisional Court (Williams and Mathew JJ.) made an order that the proceedings be amended by striking out the words "Richard Johnson Railton sued as," and that the parties proceed to the trial of an issue under Order XLII. r. 8, in which Munster should be plaintiff and Cox defendant, and that the question to be tried should be whether Cox was liable to have execution issued against him upon the judgment as entered up (1). On appeal the Court of Appeal (Cotton and Bowen L.JJ.) set aside that order (2).

Affidavits were used in which it was alleged that the plaintiff had discovered after the trial that Cox was a partner in the firm of R. J. Railton & Co., and was responsible for the publication of the libel which had appeared in a newspaper published by the firm. It was also alleged that Cox was present at the trial and was in reality defending the action and instructing the solicitor. There was conflicting evidence on this point; and it was alleged on behalf of Cox that he had dissolved partnership with Railton before the writ was issued.

J. Woollett and *H. Tindal Atkinson* (*Coghill* with them) for the appellant, contended upon the evidence that Cox was a partner in the firm, was responsible for the libels, had had the defence of the action left to him by Railton, and was a party to the consent given to the verdict and judgment. That this being so, there was power under Order LIX. r. 2, to make the amendments asked for by the summons, and to direct an issue under Order XLII. rr. 8 and 10, and that since the plaintiff had been misled by the defendants into making a mistake, these powers ought to be

(1) *Munster* v. *Railton*, 10 Q. B. D. 475.

(2) *Munster* v. *Railton*, 11 Q. B. D. 435.

H. L. (E.) 1885 MUNSTER v. COX.

exercised. They cited *Jackson* v. *Litchfield* (1) and *Ex parte Young* (2), and referred to Order XVI. rr. 10, 15.

The rules referred to were those in force before the new rules issued in October, 1883, the question having arisen before that date.

McLeod Fullarton and *M. Micholls* for the respondents were not heard.

EARL OF SELBORNE L.C. :—

It appears to me that this appeal has no merits either in form or in substance. By the Rules of Court which were in force before the year 1883, to which reference has been made, it was thought convenient to provide that traders carrying on business under a firm name might sue or be sued in the firm name,—a thing which I believe had long been the law in Scotland, and which seemed in some cases likely to be practically convenient. It was manifest that when the firm name was used there might or there might not be more than one partner in the firm; and the rules were intended to provide for both cases. Where a plaintiff chose to sue in the firm name he might so sue, though to his knowledge there was only one individual in the firm. Where there were, or might be, or were supposed to be more partners than one, it was not necessary to serve all of them if the action was brought against the firm; one or more or any number might be served or have notice; and the plaintiff, if he wished to know who the partners in the firm were, might by easy proceedings, pointed out in the rules, ascertain who they were; and when he had obtained his judgment in the ordinary course in an action brought against the firm sued, the traders as a firm consisting of more than one person, the rules went on to provide what should be done in order to obtain execution against a person who had not practically defended the action. In the first place against partnership assets execution might issue. In the second place it might issue against any one who had acknowledged on the record that he was a partner or had been lawfully adjudged to be one. In the third place it might issue against any person who had been properly served with the

(1) 8 Q. B. D. 474. (2) 19 Ch. D. 124.

writ and had not chosen to come in and defend, but had left the defence to somebody else. If execution was sought against any other person as being a member of the firm, then the Court was to exercise its discretion as to whether it would allow execution to issue or not, and upon what terms, and, as justice seemed to require, might let in the party sought to be affected by the judgment to the benefit of a defence,—not indeed by trying the action over again, but by giving him, as against the application to make him answerable, the benefit of any defence which he might have had if he had been made a party on the record or had had notice of the proceeding, so as to relieve him from the risk of suffering by the collusion or the improper defence of his co-partner.

This action was brought for libel, by the plaintiff, against R. J. Railton & Co. (that is, defendants or a defendant, whether one or more, for it might be one and it might be more) in a firm name. The appearance that was put in stated in effect that there was only one partner; the appearance was entered for "Richard Johnson Railton (trading as R. J. Railton & Co.), the defendant in this action," distinctly defending and purporting to defend under that rule which provided for the case of a single person trading under a firm name. The plaintiff, instead of availing himself of the means which the rules provide for ascertaining, by putting the party, if necessary, to his oath, whether there were any other partners, accepted that state of the case and conducted all the subsequent proceedings in the action expressly and avowedly upon the footing of it. The statement of claim in which he sets forth the case on which he proposes to go to trial is the next proceeding. Not only is that entitled "between Henry Munster, plaintiff, and Richard Johnson Railton (sued as R. J. Railton & Co.), defendants," but in the first paragraph he says that "the sole defendant is Richard Johnson Railton, who at the time of the grievances hereinafter set out was and still is the printer, publisher, and proprietor of the newspaper called the '*Brightonian*,' and who carries on business at 24, Duke Street, Brighton, under the style of R. J. Railton & Co." When a firm, treated as consisting of a plurality of persons, or meant to be bound if it does consist of a plurality of persons, is sued, no individual

H. L. (E.) 1885 MUNSTER v. COX. Earl of Selborne, L.C.

is represented as being the sole defendant, and as carrying on business under a particular style. It is manifest, therefore, that the whole of the pleadings, since the suit originated in this case, on both sides, have been conducted on the footing of there being a single defendant, and not more defendants than one, sued under the firm name, and that single defendant as carrying on business under the firm style. That state of things goes on in the reply and in the notice of trial. Then the action proceeds to trial, and a consent judgment, which could not possibly have been pronounced otherwise than by consent, because it is adjudged that costs are to be taxed as between solicitor and client, a thing which could not have been done if the action had proceeded to trial on the merits,—a judgment expressly by consent is drawn up in that form, "between Henry Munster, plaintiff, and Richard Johnson Railton (sued as R. J. Railton & Co.), defendant;" a verdict is taken by consent, a judgment is entered by consent, the costs are to be taxed as between solicitor and client, and nothing is adjudged at all except that judgment by consent, as against that sole defendant sued as R. J. Railton & Co.

It appears that subsequent inquiries have led the plaintiff to the belief that in reality there was another partner in the firm besides Mr. Railton, namely, Mr. Cox; and if he had conducted the proceedings in a proper way for that purpose he might perhaps have succeeded in making Mr. Cox liable for the tort for which he had sued, first the firm simpliciter, and afterwards, after the appearance had been entered in the manner which I have mentioned, Mr. Railton, as trading under the firm name. But after (not before) he has got the last shilling from Railton, by way of execution, which he could get under this judgment, finding it insufficient to pay the amount of these costs to be taxed as between solicitor and client on the footing of that consent order, he now wants to see whether he can get execution against Cox also. He finds that in the first place he cannot possibly ask for execution against Cox under the consent judgment as it stands, he is conscious that it is not a judgment against a firm consisting of a plurality of persons, or which may consist of a plurality of persons, but is a judgment against an individual, the only consenting party to the judgment, who is sued under a firm name. He finds that

before he can as much as ask the Court to issue execution, under this judgment, against Cox, he must get the judgment amended and make it a judgment against Cox, that is to say, a judgment against an aggregate firm of which he will then proceed to shew that Cox was a member; and having done that he must next apply to proceed in execution against Cox. It is not as if it were a mere technical matter to make the amendment in the consent judgment; it would, as it seems to me, have required an amendment not of this proceeding only, but of every proceeding in the action from the beginning after the time at which the appearance was put in by an individual sole trader under the firm name,—that is to say, every proceeding in which the plaintiff had adopted it. I am not at all satisfied that under the rules there was any irregularity whatever in the title. The substance of the rule is this, that when there is a sole trader under a firm name he may be sued by his firm name and the firm name shall continue to be used. It is so throughout this matter, only the fact being stated by the defendant, and accepted and acquiesced in by the plaintiff, of this being a case of a sole trader under a firm name, in order to make it clear and unequivocal throughout all the proceedings, his individual name is mentioned, and the words are added, "sued as R. J. Railton & Co." I am not satisfied that there is even in form a departure from the letter or spirit of the rules, as applied to the case which both parties agreed in treating this case as being from the very first step in the action, namely, the case of a sole trader trading under the firm name.

But if it be for a moment supposed that this title is technically incorrect, ought an amendment to be granted when that is the title on the footing of which a consent order is made? I think not. For what purpose? For the purpose of introducing the next application, namely, that execution shall issue, under this judgment, against a person who had not down to that time been treated as a party to the action, who was not treated as a party to the consent judgment, and who in point of fact could not be so treated consistently with the pleading from the first. It is said that Mr. Cox was privy to and cognizant of everything that was done—that in reality he was at the expense of defending the action against Mr. Railton, and that the solicitor

H. L. (E.) 1885 MUNSTER v. COX. Earl of Selborne, L.C.

charged him in his books with the costs of that action. All that may be perfectly true; but the question is whether it was an action against Cox as a party, in such a sense that his privity to the consent given by Railton to this judgment makes it a consent to a judgment against himself, or against a firm of which he is a member, to be bound and affected by that judgment. It seems to me as clear as possible that it was upon the precisely opposite footing—that everything which Mr. Cox may have done in aid of Mr. Railton was done upon the footing of the action being treated as an action against Railton as a sole trader under the firm name, and upon the footing of Railton and Railton alone making the apology and paying the costs. Therefore, if the Court were to permit this amendment to be made for the purpose of issuing execution against Mr. Cox, it would be treating it as a judgment against him by consent, to which for any such purpose he never would have consented at all, and to which in fact he did not consent. He may have been an adviser and an indemnifier of the person who did consent. That does not render it in any sense such a consent by him to this judgment as will make it a judgment binding upon him; and if it were, then the order made by the Court would be, in my opinion, wrong and irregular, for instead of allowing Mr. Cox under this judgment by consent to enter at large into all defences which he might otherwise have made to such an action by which he was to be bound, or under an application to execute against him an adverse judgment, the sole question ought to have been whether, it being treated as a judgment against the firm, he consented to it. If he did, then of course it would be just the same thing as if he had been a defendant on the record. That view is most distinctly expressed by Bowen L.J. at p. 79 of the Appendix, and I really think that the whole case is summed up in a nutshell by that learned judge. "The plaintiff," he says, "asks us, by force of a rule that I know not, to amend the judgment without amending the previous proceedings, that is to say, to leave Railton in as a defendant of pleadings and as a defendant for trial, and to convert a judgment by consent which Railton has given into a judgment by consent which Cox gives. If we were to do that, I repeat that would be Oriental justice." Cotton L.J. seems to me to shew

that he also entirely concurs in that view. That goes to the whole substance of the case, as well as to the matter of form.

With regard to the two learned judges who, in the Divisional Court, reversed the original order of Master Kaye, I will only say that on reading their judgments I considered that they did not, in their reasons, so advert to the nature and character of a judgment by consent, as to shew that their minds were distinctly addressed to that question.

I therefore move your Lordships to dismiss this appeal with costs.

LORD BLACKBURN :—

My Lords, I have come to the same conclusion. The question really turns upon the effect of the rules, by which a writ may be issued against persons who are carrying on a partnership in a suit instituted in the name of the firm. By the old process you could not do that. That was changed, and it was made so that you might have a writ against the firm. It might be against either one or more persons who were actually partners in the firm, or it might be against a single person who was carrying on the business in the name of the firm; and there were provisions made as to what should be service in each of those cases. Order IX. rule 6 of the rules in force before 1883, was as follows: "Where partners are sued in the name of their firm, the writ shall be served either upon any one or more of the partners, or at the principal place within the jurisdiction of the business of the partnership," which I need not trouble about, "and, subject to the rules hereinafter contained, such service shall be deemed good service upon the firm." And then the next rule, 6*a*, was, "Where one person carrying on business in the name of a firm, apparently consisting of more than one person, shall be sued in the firm name, the writ may be served at the principal place within the jurisdiction of the business so carried on, upon any person having at the time of service the control or management of the business there, and, subject to any of the Rules of the Supreme Court, such service shall be deemed good service on the person so sued."

Now the writ in the present case was issued against R. J. Railton & Co. R. J. Railton & Co. was the name under which the

H. L. (E.) 1885 MUNSTER v. COX. Lord Blackburn.

newspaper was carried on; and the writ was served apparently upon Richard Johnson Railton, as an individual, at the place of business; and if it had been intended as an action against the partners, it would have been, according to the rule which I have just read (the first of those rules), good service against the firm, and he might have proceeded against the firm consisting of the partners. There is a difficulty in the case which I am about to mention, and I do not know whether or not it has been thoroughly considered. It may very well be that when you are serving the partners, who are all ostensible partners, and you know who are the partners, there may be no difficulty, when you have served one partner and an appearance is entered, in going on against the firm and getting your judgment ultimately. But *King* v. *Hoare* (1) (and a comparatively recent case in the House of Lords (2) went to the same point), shews that where there is a dormant and concealed partner, your getting judgment for a joint debt against the other partners will bar you from commencing an action against that concealed principal, because the mere fact of the judgment, without execution, turns it into rem judicatam, and it is a bar. There may be difficulties arising in such cases as that.

Now there is really no mode of getting execution against Cox as the case now stands. Mr. Railton having been served in that way, his attorney "entered an appearance for Richard Johnson Railton (trading as R. J. Railton & Co.) the defendant in this action." He asserts (falsely it is said, and very likely it may have been falsely, I do not know whether it was or was not) that he is the defendant in the action, and it is tried under his name, and judgment is entered against him. If the plaintiff, Mr. Munster, had at the time when that appearance was entered in that way, and he got notice of it, been aware or believed that there was a person of the name of Cox or anybody else who was a partner in the firm, if he really meant not to proceed under the second of the two rules but to sue the firm, he might have taken proceedings (I do not pretend at this moment to be familiar enough with the new practice to say how, but at all events he might have taken proceedings) against the partner, or at all events he might have said, "This man is undoubtedly a member of the firm

(1) 13 M. & W. 494. (2) *Kendall* v. *Hamilton*, 4 App. Cas. 504.

trading under that name. I am suing the firm." But he does not do so.

It is not merely that the heading of the cause is "Between Henry Munster, plaintiff, and Richard Johnson Railton (sued as R. J. Railton & Co.), defendant," but the first paragraph of the statement of claim shews that it was decidedly done with that view, that the business was represented as carried on solely by Mr. Railton (erroneously it may be), really meaning to say the person trading under the firm name, who it was really believed at that time was the sole person trading under the firm name. The end of it seems to be that a judgment is obtained by consent in that name. And then it is said that inasmuch as if proper steps had been taken under this writ, on this service, the plaintiff might have had the appearance amended and such proceedings taken as to carry on an action as against the firm, an order should be made to amend it and turn this which is a judgment in an action not carried on against the firm into a judgment against the firm itself. That, as it strikes me, is not merely an amendment of a technical slip in form, but it has the effect of turning all those proceedings which ended in a verdict by consent against Railton as an individual, into proceedings and a verdict against Railton and Cox as a firm, and that seems to me a very substantial change altogether. Mathew J. refers to the rule (1) which says what powers of amendment the Court shall have, and I quite agree that its powers of amendment were very extensive indeed; and if this were a proper case in which to apply them they might be applied. But taking it to be the fact that it might be proved that Cox is jointly liable with Railton in those matters for which Railton is sued, I think that changing it from its being against Railton (an individual trading under the firm name and consenting to a verdict) into an action against Railton and Cox as being the firm and consenting to a verdict against Cox, is changing the substance. If Mr. Munster wishes to recover anything against Cox in the way of damages, he having obtained a judgment against one person, his plan would be to get rid of it altogether; and if he had asked for that, he might perhaps have been entitled to set aside all the proceedings subsequent to the

(1) Order LIX. rule 2 of the Rules in force before 1883.

H. L. (E.) 1885 MUNSTER v. COX. Lord Blackburn.

appearance, in order that they might be carried on as against the firm, and to let Cox defend the action, having notice, as he pleased; but I do not think that he can change it as he seeks to change it now from its being a judgment against Railton as an individual alone into a judgment against the firm, for the purpose of taking subsequent proceedings against Cox as having been a latent partner or a partner who did not choose to appear and left everything to be decided without his interference.

I consequently agree in what the Lord Chancellor has moved.

LORD FITZGERALD:—

My Lords, I concur in thinking that the judgment of the Court of Appeal was correct. Now (to use the illustrative language of Bowen L.J.) I will not pretend to say what the decision might have been if the appellant had sought to take up the dropped stitch and amend his proceedings from it downwards, that is to say, to amend the appearance, to amend the statement of claim, to amend all the subsequent proceedings, to set aside the consent, and to vacate the judgment. But one thing is very obvious. It seems to have been forgotten that if the summons had been of that character, a party entitled to resist, and to resist most strongly, would have been Railton. He would have been entitled to say, "The proceeding is terminated as against me; you accepted from me personally a consent for a forty shillings judgment with an apology; you have the apology and the judgment, and you have put that judgment in force; but now you seek to throw everything open, to re-commence the action from the time of the appearance, and with a result which may be totally different." Therefore even if the application of the plaintiff (the appellant) had been of that large character, still he might possibly not have had it granted; he would, in fact have been wresting one of the rules to make it applicable to a case to which it was never intended to apply.

In determining the very summons which was before the Divisional Court two matters appear to have been entirely lost sight of—the one was the nature and character of the action, and the other was that it was a judgment by consent. I advert to the nature and character of the action for the purpose of calling

attention to this, that if we had to determine this point I should require to hear a good deal more than I have heard to satisfy me that Railton could, by consent, in such an action bind his partner Cox. It is an action not in respect of a partnership contract, of a debt, or a money demand—it is an action to recover damages for that which was a crime, namely, for a malicious libel—that is what the action is for; and I should doubt very much whether one partner, whatever he might do in other transactions, could have authority to bind his absent partner by his consent in such a transaction.

Again, the Divisional Court does not appear at all to have taken into consideration the fact that this proceeding was by consent; and I have always understood it as a settled rule that where parties withdraw themselves from the jurisdiction and do not seek to obtain a judgment according to law but substitute for it a judgment by their own consent, the Court has no power to alter that consent. If the consent has been obtained by fraud or surprise it may set it aside, and if the proceedings upon it have been improvident it may vacate these proceedings; but I have yet to learn that a judgment by consent against one party, against A. B., can be changed into a judgment against C. D., his partner.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 15th June 1885.

Solicitor for appellant: *W. Brewer.*
Solicitor for respondent: *H. Montagu.*

[HOUSE OF LORDS.]

COMMITTEE FOR PRIVILEGES.

H. L. (Sc.)
1885
July 22.

THE LAUDERDALE PEERAGE.

Held, that Major Frederick Henry Maitland had made out his claim to the Earldom of Lauderdale and the other honours connected therewith in the Peerage of Scotland.

Marriage, Proof of—Certificate and Relative Affidavit—Admissible Evidence—Legitimation of Children by subsequent Marriage—Marriage on Death-bed—Succession to Real Estate—Scotch Law.

Where a marriage is proved to have been solemnized de facto 113 years ago by people who intended that it should be a good marriage, and it is done bonâ fide and openly, the maxim omnia rite acta præsumuntur applies.

The marriage of a domiciled Scotchman legitimates his children born previous to the marriage, and the children's right to succeed to his heritable estate is not prejudiced by the marriage taking place on death-bed.

By the law of Scotland statements of a deceased person in relation to facts, which must presumably have been within his personal knowledge, and to which, if alive, he could have been examined as a witness, may after his death be received as secondary evidence through the medium of writing, or through the medium of a living person who heard the statement. Where, therefore, a member of the family writes a note in a manuscript book to the effect that he has sent original letters to a certain person, and they cannot be found, the copies of such letters, the handwriting, and that the copies were from original letters being proved, the note, and the copies of the letters, are evidence of the truth of the statements within the writer's personal knowledge, and appearing to be so by the letters themselves.

So also a statement, whether oral or written, is not vitiated if made with a purpose, where the object was an obvious and legitimate one and one supporting and not discrediting the presumption of truth. But the statement of a deceased person is not admissible as evidence when its terms, or the circumstances in which it was made, are such as to beget a reasonable suspicion either that the statement was not in accordance with the truth, or that it was a coloured or one-sided version of the truth; and this rule should be applied with greater strictness in criminal cases: *Magistrates of Aberdeen* v. *More* (1813. Hume's Dec. 502); *Geils* v. *Geils* (1855. 17 Court Sess. Cas. 2nd Series, 397); *Gordon* v. *Grant* (13 Ibid. 1); *Madeline Smith* (1857. 2 Irving's Justiciary Rep. 653); *Macdonald* v. *Union Bank* (1864. 2 Court Sess. Cas. 3rd Series, 963), examined.

A minute, of date 1749, from an original unsigned minute book, produced

from the proper custody and kept in accordance with a charter of a society, is admissible evidence.

A memorandum in a register of a church by its deceased rector made about 108 years ago, though not a contemporaneous entry made in the regular course of the register, is admissible as evidence, and goes to prove that the rector did the things stated in the memorandum.

A change of domicil must be a residence sine animo revertendi. A temporary residence for the purposes of health, travel, or business does not change the domicil. Also (1) every presumption is to be made in favour of the original domicil; (2) no change can occur without an actual residence in a new place; and (3) no new domicil can be obtained without a clear intention of abandoning the old.

A., then ill of the malady of which he died, and two days before his death, was married in 1772 in New York to B. by C., an ordained clergyman of the Church of England, then assistant minister of Trinity Church, New York. There was produced, inter alia, in support of the marriage from the custody of the family a certificate signed by C., that he had married A. and B. according to the rites of the Church of England as by law established, and an affidavit, signed by the mayor of New York, to the effect that C. had made oath of the truth of the statements in the certificate; a will of date anterior to the marriage, by which A. left all his property to B. and the children then born; copies of letters shewing that one of the executors wrote to his co-executor in England, a brother of A., stating that he was a witness to the ceremony of marriage; that B. signed herself in A.'s surname; that the children were recognised and taken care of by members of the family as A.'s children; and also War Office records shewing that B. received a pension as A.'s widow:—

Held, that there was ample proof of a legal marriage.

Per LORD BLACKBURN:—When English settlers go out to a colony and settle there they carry with them, so far as may be applicable to their purpose, all the immunities and privileges of the law of England as the law of England was at that time.

CHARLES, twelfth Earl of Lauderdale, heir male of Charles, the second surviving son of Charles the sixth Earl, died on the 12th of August, 1884, without having been married.

The claimant to the peerage and relative honours was Major Frederick Maitland, of the Bengal Staff Corps; who claimed descent from Colonel Richard Maitland, fourth son of Charles, sixth Earl of Lauderdale; the third surviving son of that earl, namely, George, having died unmarried.

The counter-claimant was Sir James Gibson Maitland, who claimed to succeed to the titles in question as heir male of Alexander the fifth son of Charles, sixth Earl, on the ground that Richard, the fourth son of Charles, sixth Earl, died without lawful issue.

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE.

The petitions of the claimant, and counter-claimant to Her Majesty, were referred to the House of Lords, and by the House to the Lords' Committee for Privileges.

The material questions were (1.) whether there was sufficient proof of the lawful marriage of Colonel Richard Maitland with Mary McAdam, at New York, on the 11th of July, 1772; (2.) whether Colonel Maitland at the time of his marriage retained his Scotch domicil; (3.) whether the marriage having taken place on what was Colonel Maitland's death-bed, the children born before wedlock had been legitimized. It was also a question whether a law passed in 1664 and another in 1684, rendered the publication of banns or license, an indispensable preliminary to a lawful marriage in the state of New York, and that such Act continued to be the law down to the marriage in 1772.

The facts set out in the claimant's petition were substantially as follows:—

Colonel Richard Maitland was the fourth son of Charles, sixth Earl of Lauderdale, and was born at Edinburgh, on the 10th of February, 1724, and it was not denied that his domicil of origin was undoubtedly Scotch. In September, 1743, Richard Maitland entered the Marines. On the 1st of August, 1744, he obtained a commission in the army, and in September, 1754, he was gazetted a captain in Colonel Kennedy's regiment (H.M.'s 43rd Regiment of Foot). In 1757 he embarked with his regiment for America and there remained with it, except when on leave of absence, until 1760. In the month of July in that year, he was sent to England with despatches, received a commission as Deputy Adjutant-General to H.M.'s forces at Quebec, and in the same year sailed to America to take up his appointment.

In 1762, he returned a second time to England with despatches, and on the 30th of May, 1764, was appointed Deputy Adjutant-General to the Forces in North America, and he was present at New York in that capacity on the 24th of September, 1764. This appointment he held up to the day of his death. On the 25th of May, 1772, he was appointed colonel in the army. He died on the 13th of July, 1772, at New York, the head-quarters of General Gage, the Commander-in-Chief of His Majesty's forces in North America. He remained a captain on full pay in the 43rd

regiment until the day of his death, and in certain returns taken of his regiment, his country is marked "Scotch." Colonel Richard Maitland was married in New York on the 11th of July, 1772, to Mary McAdam, by whom he had then three children, namely, Richard, Patrick (sometimes called Peter), and John. At the time of the marriage his wife was enceinte, and, after his death, a fourth child, James, was born. The ceremony of marriage was performed by the Reverend John Ogilvie, D.D., one of the assistant ministers, Trinity Church, New York.; William McAdam, merchant in New York (who was no relation to Mary McAdam), and Dr. William Bruce of the Royal regiment of Artillery, were witnesses at the ceremony. On the 13th of July, 1772, two days after the marriage, Colonel Maitland died, leaving a will dated the 16th of February, 1771, in which he bequeathed his property to his "natural sons, Richard and Peter, children of Mary McAdam, and to the said Mary McAdam and the child with which she is now pregnant."

By the will he appointed five executors, including the Rev. Dr. John Ogilvie, William McAdam, and Dr. William Bruce, whom he described therein "as his friends." The Rev. Dr. John Ogilvie gave a certificate of the marriage, and after the death of Colonel Maitland the Rev. Dr. John Ogilvie attended before Mr. Whitehead Hicks, the mayor of the city of New York, and on oath deposed as to the truth of the contents of this certificate, and to the fact that the signature was in his handwriting. The mayor then gave a certificate under the seal of the mayoralty of such deposition.

The will of Colonel Richard Maitland was proved by the Rev. John Ogilvie, William McAdam, and William Bruce. The other executors were the testator's brother, Colonel the Hon. Alexander Maitland, who then resided in this country, and Major Thomas Moncrieff.

The three accepting executors wrote to their co-executor, Colonel Alexander Maitland, a joint letter from New York, dated the 4th of August, 1772, announcing the death of his brother Richard, the fact of his marriage, and of his having left children, and they enclosed a copy of his will. William McAdam, at the same time, wrote a separate letter to Colonel Alexander Maitland,

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE.

in which he mentioned the names of the children, and states that he was a witness, with Dr. William Bruce, to the ceremony of marriage.

After the death of Richard Maitland his widow applied to the War Office for a pension, as the widow of Colonel "Richard Maitland, Esquire, who died a captain on full-pay in the 43rd Regiment of Foot." The pension was granted to her by royal warrant, and was received by her until her own death in 1787.

Before 1786 the three accepting executors to the will had died, and in that year an application was made to the legislature of the state of New York, by the widows of the executors, for a private Act to vest the estate of Richard Maitland in trustees for the realisation of his remaining estate, and for the payment of his debts. In the petition presented for this purpose they set out the will, and also the facts, inter alia, of the marriage of Richard Maitland; of his having left a widow; the fact of his having had a third son, namely, John, after the date of the will, and a fourth son, James, after the date of the marriage.

The eldest son of Colonel Richard Maitland was born in 1767, and died without issue on the 17th of March, 1802. The second son, Patrick (commonly called Peter), was born in or about 1769, and from him the claimant, Major Frederick Henry Maitland, is descended. The third son was born about October, 1771, and died without issue in 1836. James, the fourth son, was born in 1772, and was killed at the siege of Bhurtpore on the 9th of January, 1805, unmarried.

Patrick (or Peter) became a member of the banking firm of Palmer & Co., Calcutta, and married there on the 28th of February, 1807; died on the 29th of January, 1821, leaving issue Frederick Colthurst, born on the 1st of January, 1808; Elizabeth, born in 1808; and Patrick John, born in 1816. The eldest son married on the 29th of August, 1837, and had three children, Ellen, Frederick Henry, born on the 16th of December, 1840, the claimant, and George Thomas, born in 1841.

The sittings of the Committee for Privileges commenced on the 10th of June, 1885, and were continued on subsequent dates; the Law Peers present during the sittings being the Earl of

Selborne, L.C., and Lords Blackburn, Watson, Bramwell, and FitzGerald.

Sir *F. Herschell*, S.G., *Shiress Will*, Q.C., *Graham Murray*, and *Orlando Bridgman*, appeared as counsel for the claimant, Major Frederick Henry Maitland.

The Solicitor-General for Scotland (*Asher*, Q.C.), *Davey*, Q.C., *Jeune*, and *W. H. Monckton*, were for the counter-claimant, Sir James Ramsay Gibson Maitland, Baronet.

Sir *Henry James*, A.G., and *The Lord Advocate* (*Balfour*, Q.C.), with them *Crawford*, represented the Crown up to the 24th of June, after which date Sir *Richard Webster*, A.G., *The Lord Advocate* (*MacDonald*, Q.C.), and *Mure*, were for the Crown.

June 10, 11, 12, 13. Sir *F. Herschell*, S.G., opened the case for the claimant, and stated the facts above given.

In the course of the evidence a witness stated he had examined the register book of Trinity Church, New York, and had found therein the following:—

TRINITY CHURCH, in the City and County of New York.
Page 1. Volume 1. Marriages.

MARRIAGES.

1764
March 7 } Frederick Maleo & Elizth Kelly
„ 12 } Robert Munro & Margaret Howard

The preceding Register of Marriages commencing Nov. 30th 1746 and ending March 12th 1764 was kept by Mr Hildreth the late Parish Clerk and probably contains only the names of such persons as were married by the Revd Dr Henry Barclay formerly Rector of Trinity Church.

Dr Barclay died in August 1764 and the Register was discontinued from that time till the death of his immediate Successor the Revd Dr Samuel Auchmuty who died in March 1777 To fill up this interval in the best manner I could I have here transcribed the names of those persons who were married by Dr Auchmuty.

Those names are taken from a private Register of the Doctor written with his own hand and seems to contain the names of all the persons he married from his first settlement in this Parish to the time of his death. After these I shall insert the names of such persons as I married whilst I was Assistant vizt from December 1765 to March 20th 1777 when I was chosen Rector.

I would have added the names of persons married by the Revd Dr John Ogilvie

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE.

whilst he was Assistant from 1764 *to Novr* 26*th* 1774 *when he died but I could not procure the Register of them if he kept any.*

(1) Dr Auchmuty's Register of Marriages

1748 Janry 27 George Ewing & Elinor Foot

June 10 Samuel Roberson & Elizabeth Even

Transcribed by me

CHARLES INGLIS

Rector

The witness also stated, that he had found no entries of marriages performed by Dr. Ogilvie.

The Solicitor-General for Scotland (*Asher*, Q.C.), objected to this memorandum being received, as it was not an extract of anything which a marriage record would naturally contain. It was an attempt to shew an exceptional practice on the part of Dr. Ogilvie not to register his marriages. It appeared to be an ex post facto memorandum, put into the register by a person who it was not proved knew anything about them, and therefore not entitled to credence.

EARL OF SELBORNE, L.C.:—

I cannot doubt that this document ought to be received, valeat quantum. The question is, whether a particular marriage took place at a certain time at Trinity Church, New York. Evidence is given of a search for a register which seems to have been kept at that church, and primâ facie, if regularly kept, ought to have contained the record of a marriage, if there solemnised. It is found, as proved by the witness, that in that register there is no record of that marriage, but the witness also proves what the register does contain; and it contains this note purporting to be under the hand of a deceased person, formerly the rector of the church, in which he states, as a matter of fact, that he had with his own hand made certain entries now appearing upon the face of the register, and covering, as far as they go, the period of time within which this marriage should have taken place; but that these entries made by himself are not contemporaneous entries made in the regular course of the register. And then he goes on to say that he has endeavoured to procure another private register, similar to that from which he says he made those entries as

to Dr. Auchmuty's marriages. He has endeavoured to procure a private register, if any was kept, by another clergyman, whom he represents as having been assistant during a certain period of time, but that he was not able to find any. The law of Scotland, which makes these statements of deceased persons, as to matters which they would have been competent to prove, if living, primâ facie evidence, makes this, I think, primâ facie evidence that he did make these entries now appearing upon the face of the register, which he says he made, taking them from a document which he at least supposed to be a private register of Dr. Auchmuty; and that he endeavoured to procure, and had been unable to procure, a similar private register, if there ever was any such, of marriages, if any, which were performed by Dr. Ogilvie. Of course it does not prove that Dr. Ogilvie did perform any marriages, or what marriages they were. Possibly it may not be enough even to prove that he was an assistant during a certain period of time; but it does prove that the entries now in the register were made by this gentleman from the source he describes, and that he endeavoured to procure a register of other marriages not kept by him, and did not procure it; and it being legitimate to shew what does and what does not appear by the register, it appears to me to be impossible to reject that part of the evidence.

LORDS BLACKBURN and WATSON concurred.

The document was received.

In the course of the evidence as to who the Rev. Dr. John Ogilvie was, a witness produced an original minute-book of the Society for the Propagation of the Gospel in Foreign Parts, containing an unsigned minute dated the 17th of March, 1749. The witness also stated that the society was incorporated under royal charter, which could be produced (1), and that one of the objects of the society was to send missionaries to foreign parts; and that no minutes were read or confirmed in those days—they simply put "adjourned."

(1) The charter of the society was produced and handed in at a later stage in the proceedings.

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE.

The Solicitor-General for Scotland (*Asher*, Q.C.), objected to the minute-book being received, on the ground that it was not, according to the Scotch system, competent evidence of what is recorded in it.

[EARL OF SELBORNE, L.C.:—It appears to stand thus:—A corporation, constituted by charter for certain purposes, is appointed to meet on stated days by its charter. This book purports to contain original entries (the book being produced from the proper custody) of all the business done at the meetings held by the society upon the days appointed by the charter, and it is proposed in that way to prove that upon one of those days certain business was done.]

A minute-book, however regularly kept, is not recognised in our law as evidence of facts therein stated.

Sir F. Herschell, S.G., mentioned Dickson on Evidence, sect. 1170.

EARL OF SELBORNE, L.C.:—

I must advise your Lordships to receive this evidence. It relates to matters of great antiquity, which there must be some means of proving in point of law, if they are for any purpose material in any inquiry, and I cannot conceive any better means or any means so good of proving them as by the contemporaneous records of the public body by which the act purports to have been done. Here we are dealing with the books of a corporation incorporated for purposes, to a certain extent, and in a certain sense, of a public character, under a royal charter. The question is whether that corporation did a certain act upon a certain day in a certain year. What possible way of proving that can there be, after the lapse of more than a century and a half, better than or as good as the production of the books of the corporation, which by its charter was obliged to hold general meetings on certain periodical days, and which by this book appears to have held such meetings, and to have done such acts? It is for the purpose, and, as I understand, only for the purpose, of shewing an act of that corporation, at one of its stated regular meetings,

as entered in its own books, that this evidence is offered; and for that purpose, I think it admissible.

LORD BLACKBURN:—

I also concur that, for that purpose, it is admissible. What the entry, when we read it and know what it is, amounts to I do not know as yet; but for the purpose of shewing that the Missionary Society did agree to that which it purports to have agreed to in that minute, I think it is admissible evidence; indeed, the only evidence which could be produced.

LORD WATSON:—

I am of the same opinion.

The evidence was received.

The minute was read, and went to shew with other entries that John Ogilvie was ordained and appointed missionary to go to America.

A copy of a minute of a meeting of Trinity Parish, New York, dated the 24th of September, 1764, appointing Rev. John Ogilvie to be called as an assistant minister to the rector of the church was tendered in evidence.

Mr. Nash, of the New York Bar, was examined, and stated that he was warden of the parish and clerk of the vestry; that Trinity parish was incorporated by royal charter before the Revolution, and after the Revolution its corporate powers were confirmed by the legislature of the state of New York.

Certain original letters bearing the signature of John Ogilvie to the society, and now in its custody, were also tendered and received. They went to prove the identity and the handwriting of the John Ogilvie who was sent as a missionary; and the internal evidence shewed that they were written by the same person who had been ordained in 1749, and who had been appointed assistant minister.

The marriage certificate was then produced, and was as follows:—

"This is to certify, to all whom it may concern, that on the eleventh day of July, in the year of our Lord one thousand seven hundred and seventy-two, in the City of New York in America; the Honorable Collonel Richard Maitland,

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE.

and Mary McAdam, were joined together in the holy Bands of matrimony, according to the Rites and ceremonies of the Church of England, as by law established, by me John Ogilvie."

They also produced, attached to it, the original certificate under the hand of Mr. Whitehead Hicks, mayor of New York, which was as follows:—

"City of New York, } s.s. I, Whitehead Hicks Esquire Mayor of the said city do by these presents certify declare and make known, to all to whom the same shall come, or may in any wise concern; that on the day of the date hereof, personally came and appeared before me the Reverend John Ogilvie Doctor of Divinity in the said City of New York in North America, and being by me duly sworn on the Holy Evangelists of Almighty God, on his oath did declare, that the contents of the certificate hereunto annexed, certifying the marriage of the Honorable Colonel Richard Maitland to Mary McAdam, and bearing date the eleventh day of July one thousand seven hundred and seventy-two is true; and that the said certificate was signed with the proper handwriting of him the deponent. And I the said Mayor do further certify, that the said John Ogilvie is one of the assistant ministers to the Reverend Samuel Auchmuty Rector of Trinity Church in the said City of New York.

"In testimony whereof I the said Mayor hereunto subscribed my name and caused my seal of office of mayoralty of the said City of New York, to be affixed the sixth day of January in the thirteenth year of his Majesty's reign A.D., one thousand seven hundred and seventy-three.

"Whitehead Hicks."

"By order of the Mayor, Augt. V. Cortlandt, T. Ck."

A witness next produced an official certified copy of the original record in the office of the Secretary of State of New York, at Albany, of the appointment of Mr. Whitehead Hicks as mayor of New York. The certificate of marriage and the certificate of the mayor annexed were proved to have come from the custody of Mr. Murray, the solicitor to the late General Frederick Maitland, the father of the claimant, and a witness who had examined Dr. John Ogilvie's signature to undoubted letters of his, stated his belief that the signature to the certificate of marriage was in the same handwriting.

The Solicitor-General for Scotland (*Asher*, Q.C.), and *Davey*, Q.C., objected to the certificate as being inadmissible as evidence by the law of Scotland; for, admitting that the handwriting of Dr. Ogilvie was proved, and that the mayor's signature was proved, yet as a piece of evidence to prove that the ceremony of marriage was performed it ought to be rejected. The law of Scotland, while

extending the admissibility of hearsay so as to include a statement made by a deceased person, which if made by him in the witness-box when alive, would have been evidence, may be repeated by the person to whom it is made, but does not extend to the admissibility of a document or affidavit (and "certificate" belongs to the same category) by a deceased person: and the principle of the restriction of the exception was, that the witness to whom the statement was made could be cross-examined, and the Court would then be able to judge whether it was voluntary and spontaneous, or whether it was ex parte and for a purpose.

In *Magistrates of Aberdeen* v. *George and Alexander More* (1), the Court rejected the same deposition of a deceased person, though tendered by the party in opposition to whose interests it had been voluntarily made on oath; and in the case of *Madeline Smith* (2), a diary containing entries made simply for the purpose of an accurate record by a deceased person was held to be inadmissible. Nothing could more sharply test the certainty of the rule with regard to a written statement or verbal statement than this case, because there there was no suggestion that these documents had been kept in the murdered man's depositories for any other purpose than that of accurately recording what was put down there.

[EARL OF SELBORNE, L.C.:—We must be very cautious how we regard a criminal inquiry of that sort, where very peculiar relations had existed between the parties, even if there were no murder, as laying down a rule which is necessary to be applied in all similar cases. It was a question of life and death. There had been relations of a very special kind between these parties, and it was proposed to make the private uncommunicated entries of the man in his diary such evidence of the facts contained in them, as to found upon them an inference that at a certain time and place he was murdered by the woman.]

The reason it was rejected was, that there was an absence of that which the law of Scotland requires as the condition of its acceptance, namely, that hearsay shall be given through the mouth of

(1) June 17, 1813. Hume's Dec. 502.

(2) 1857. 2 Irvine's Justiciary Reports, at p. 653.

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE.

living witnesses: see *McDonald* v. *Union Bank* (1); *The Dysart Case* (2); *Stirling Peerage Case* (3); *Creditors of Cleland* (4); *Gordon* v. *Grant* (5); *Geils* v. *Geils* (6).

[EARL OF SELBORNE, L.C.:—Suppose this were an English case, would or would not the recognition of this document by the claimant's father be admissible as evidence in the nature of a family declaration? Suppose that Sir James Maitland were now claiming as next of kin (assuming that he was so) to the father of the present claimant, and that he died without issue, would this document, coming from the late Mr. Maitland's possession, have been evidence in support of his claim, upon the principle upon which family pedigrees are admitted coming out of the proper custody.]

It may be that in pedigree cases statements by members of the family are for certain purposes evidence, and undoubtedly inscriptions on tombstones, and family trees—pedigrees in that sense—which are preserved in the family seat as authentic, have also been admitted in evidence. But there is no case in which a document purporting to be a statement by some person who is not a member of the family is evidence, merely because it comes out of the custody of a member of the family.

The Lord Advocate (*Balfour*, Q.C.), on the part of the Crown:—

Applying the principle of the law of Scotland, this certificate ought to be admitted for what it is worth. Marriage according to the law of Scotland is a consensual contract, and primâ facie it can be proved by parol. Therefore, if the question had been one of proving the marriage by the testimony of the clergyman Dr. Ogilvie, there would have been no doubt that his evidence would have been admissible to that effect. Then it would seem to follow, applying the settled principles of hearsay, and taking the next best evidence available, that if Dr. Ogilvie had said to any one, under circumstances not leading to any suspicion, that he had married these persons, that would have been evidence not

(1) March 29, 1864. 2 Court Sess. Cas. 3rd Series, 963, at p. 971.
(2) 6 App. Cas. 489.
(3) Swinton's Stirling Crim. Trial, 177.
(4) Mor. 12634.
(5) 13 Court Sess. Cas. 2nd Series, 1.
(6) 1855. 17 Court Sess. Cas. 2nd Series, 397.

objectionable upon any ground. Both on principle and authority you might have hearsay evidence which is written when dealing with a system of law which, like the Scottish law, admits hearsay or secondary evidence; the best evidence having failed, the inquiry must be whether the written statement of a person made under circumstances which do not suggest suspicion, is rather not better than evidence of what he had said verbally. For then, at all events, you have what Dr. Ogilvie said without error. The cases cited fall under the category of cases either of suspicion, or in which the whole truth is not told, and do not touch the present. In *Magistrates of Aberdeen* v. *More* (1) there was a distinct lis or dispute, and the affidavit undoubtedly intended to represent one view of that contested question. No doubt the point was so far from clear in *Madeline Smith's Case* (2), that one judge, Lord Ivory, dissented, yet it was a case altogether different from this, being a trial for murder, and a very different range of considerations arise, when you come to inquire whether everything that a person chooses to record, but does not publish or communicate and possibly dare not do so, to third parties, is to be taken as evidence, especially in a capital inquiry. *McDonald* v. *Union Bank* (3) was simply another illustration of the rule that precognitions will be excluded. *Gordon* v. *Grant* (4) was another case of deposition. In *Geils* v. *Geils* (5) the depositions were admitted, but they were admitted because the depositions were in a proceeding between the same parties. Supposing this had been a certificate handed by the celebrant clergyman to the parties at the time of the marriage, it would be a very singular and very unfortunate thing, if it could not be afterwards adduced as an adminicle of evidence of the marriage. Prior to the Registration Act of 1854, the only evidence which a great body of the poorer classes of Scotland held as to their marriage was their marriage lines, and more especially would such lines be taken as evidence in the case where relations between the parties had not begun in wedlock. The counsel for the counter-claimant argued that the circumstances of a document having been got for

(1) June 17, 1813. Hume's Dec. 502.

(2) 1857. 2 Irvine's Justiciary Reports, at p. 653.

(3) March 29, 1864. 2 Court Sess. Cas. 3rd Series, 963, at p. 971.

(4) 13 Court Sess. Cas. 2nd Series, 1.

(5) 1855. 17 Court Sess. Cas. 2nd Series, 397.

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE.

any purpose, whether a natural legitimate or indifferent purpose, will prevent it being admitted in evidence. But the sounder and safer view is to hold that if the purpose was a natural, and so far as could be seen, a proper purpose; and if it was a thing that might naturally have been done as part of the res gestæ, but might also be postponed a little, that would not be a reason for excluding the evidence; and whether the purpose was to enable the woman to get a pension, or for the purpose of recording in the interest of the woman and of the children that there had been a marriage, the case is not one to which the analogy of the exclusion of the deposition or precognition applies. Then if the certificate was none the better for the mayor's attestation, it was none the worse.

LORD WATSON:—

The documents tendered consist of a certificate and relative affidavit by a gentleman who died 111 years ago. In these circumstances it is obvious that we could not have direct oral testimony to any statement made verbally by the deceased, and we have now to consider whether a statement in writing under his hand is admissible as hearsay, or in other words as secondary evidence.

I cannot for a moment doubt that by the law of Scotland the statement of a deceased person in relation to facts which must presumably have been within his personal knowledge, and to which he could have spoken as a witness, may after his death be received as secondary evidence through the medium of writing as well as through the medium of a living witness who heard an oral statement made by him. In some cases his written statement may be evidence of a much higher and more important character than a statement made by him verbally. That will depend upon circumstances. But at present your Lordships are not considering the weight of the evidence tendered; you have only to consider whether it ought to be admitted.

It appears to me that the general rule is in favour of the admission of the documents now tendered; and that it lies upon those who object to their being received to shew that they fall within those exceptions to the rule of hearsay, which are established in the law of Scotland. It was said in argument at the

bar that a statement, whether written or oral, in order to its being receivable as evidence after the death of the person who made it, must have been made without a purpose. I cannot conceive a more startling proposition. A statement made without any intent or purpose would be utterly useless as evidence if received. What I apprehend to be the law is this, that the statement of a deceased person, whether oral or written, is not admissible as evidence, when its own terms, or the circumstances in which it was made, are such as to beget a reasonable suspicion, either that the statement was not in accordance with the truth, or that it was a coloured or one-sided version of the truth.

All the cases which have been cited by the learned Solicitor-General for Scotland appear to me to furnish illustrations of that principle. In the *Magistrates of Aberdeen* (1), and in *Macdonald* v. *Union Bank* (2), writing of the deceased was rejected, on the ground that the written statement was made with a view to a lis which was virtually pending, and for the purpose of furthering the interest of one of the parties engaged in that lis, without the contradictor having an opportunity of cross-examination. The law assumes that a person who, in these circumstances, makes an ex parte statement to one of the litigants, may and probably will so shape his statement that it will unduly favour the cause in the promotion of which it is intended to be used. The only difference between the two cases which I have mentioned was this, that, in the *Magistrates of Aberdeen* (1), there was superadded to the statement the affirmation of an oath. But it is quite obvious that an oath made to a statement in itself objectionable could by no possibility cure the objection. Two other cases were cited, namely, *Gordon* v. *Grant* (3) and *Geils* v. *Geils* (4), which illustrate the same principle. In *Gordon* v. *Grant* (3) the writings were not precognitions, that is to say, statements by a witness intended to be called at the trial; they were depositions in causâ, by witnesses adduced on behalf of one of the parties to a suit. But the person against whom they were proposed to be used was no party to the proceeding, in which the depositions were admitted; and, according to the law of Scotland, evidence taken upon oath by a competent

(1) June 17, 1813. Hume's Dec. 502.
(2) March 29, 1864. 2 Court Sess. Cas. 3rd Series, 963, at p. 971.
(3) 13 Court Sess. Cas. 2nd Series, 1.
(4) 1855. 17 Court Sess. Cas. 2nd Series, 397.

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE. Lord Watson.

Court, in one suit, cannot be used, in another suit, against a party whose interest was not represented, and who had therefore no means of testing by cross-examination the accuracy of the depositions. On the other hand, in *Geils* v. *Geils* (1), proceedings in an English matrimonial suit were admitted as evidence in a Scotch action of divorce, the parties being the same. I venture to think that the principle which rejects the precognition is precisely the same as that which has led the Court to reject statements in an action inter alios, which have been elicited from a witness by counsel and attested by an oath. It is because the law suspects that the witness may be induced to state the facts within his knowledge in the way most favourable to the interest of the persons who call him, and in the way most unfavourable to the person against whom his deposition is sought to be adduced.

Then there was a case in the Criminal Court in which a question of this kind was decided by two Judges against one, namely, the case of *Madeline Smith* (2). That case appears to me to have been decided consistently with principle and consistently with the decisions to which I have referred. The Lord Justice Clerk said, that there was no evidence of the time at which the jottings tendered were entered by the deceased in his note book, and no evidence as to the motives which led him to put them there. What the learned Judge meant by these expressions was simply this, that having regard to the relation in which the deceased stood to the accused, it was impossible to negative the suggestion that the motive which impelled him to make these entries might be a one-sided motive, unfair to the accused, leading him to enter in his book a statement which was either untrue or wilfully coloured, against the interest of the accused; and in these circumstances, more especially in a criminal case, I think it was the duty of a Judge who entertained that view to reject the evidence.

But the real question in this case is whether the certificate of Dr. Ogilvie is open to any reasonable suspicion. I listened, but I listened in vain, for some suggestion on the part of the able counsel who stated the objection to this evidence to the effect

(1) 17 Court Sess. Cas. 2nd Series, p. 237.

(2) 1857. 2 Irvine's Justiciary Reports, 653.

that there were circumstances disclosed here, or something in the context of these documents, to raise an inference that the reverend doctor had not stated that which was exactly true, or was probably under some inducement to colour the truth for the purpose of aiding the person in whose favour he issued the certificate. I have been unable to find either in the documents themselves, or in the aspect of this case, anything calculated to suggest that the reverend gentleman, in granting the certificate, and making affidavit, was under any constraint or inducement which might presumably lead him to qualify or suppress the truth with regard to facts which must have been personally known to him.

I am therefore of opinion that both these documents are admissible. The learned Solicitor-General for Scotland founded an argument upon the affidavit to the effect that assuming the certificate to be in itself a document receivable, it was vitiated by the addition of an affidavit. It was decided in the case of the *Magistrates of Aberdeen* (1) that the addition of an oath to that which is not evidence will not make it any better. But that surely is no authority for the proposition that where a document is receivable as evidence an affidavit will make it worse. I cannot conceive upon what principle such a contention could be sustained by your Lordships. The affidavit evidently refers to the certificate, and it is receivable as identifying that document.

I do not at present think it necessary to enter into any question as to the value of the affirmance of the truth of the certificate which is recorded by the mayor. The affidavit appears to me to be admissible upon various grounds, and it does not occur to me that it would be expedient to enter at this stage of the case upon a discussion as to the particular purposes for which it may be used by the party producing it.

EARL OF SELBORNE, L.C.:—

I agree generally in the opinion which has just been expressed, and I do not propose to add much to what has been said. If one is to look at this question upon principle, I must say it is to me inconceivable, from that point of view, that the law of Scotland should be in such a state as this, that hearsay evidence should be

(1) June 17, 1813. Hume's Dec. 502.

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE. Earl of Selborne, L.C.

receivable, but under conditions and limitations which make it unavailable in exactly those cases in which the ground for receiving it seems strongest and most reasonable; I mean the cases which are so remote in point of time that primary evidence is absolutely impossible. Of course, it might have been proved by authority that the law of Scotland was in a state which, to minds unaccustomed to it, might seem unreasonable, departing, where there was least necessity, from the general principle against the admission of hearsay evidence, and refusing any longer to depart from it, where the reasons for doing so were the strongest and the best. I am glad to find that such a state of the law of Scotland has not been shewn to exist.

Well, then, the general principle being that the declarations of a dead man as to matters within his knowledge are admissible unless there be reason to the contrary, I venture to think, as the noble Lord opposite (Lord Watson) has said, that a form of declaration which makes you sure that you have exactly what the man did say is preferable, if anything, to one where there may be room for doubt, depending upon the evidence of persons to whom the thing was said. There are exceptions, undoubtedly. The exceptions have been referred to, and I shall not go over them again; but I collect them to amount to no more than this, that the general rule being in favour of the reception of evidence of the declarations of deceased persons on points as to which they would have been competent witnesses, and as to which they would have had personal knowledge of the things respecting which they have made statements, if true, that general rule is subject to exception when, and only when, there is something in the document, the evidence, or the circumstances, to raise a primâ facie ground of suspicion, not perhaps so strong as to amount to an affirmative presumption of bad faith, but, as was well put by the Lord Advocate in his argument at the Bar, to make it unsafe to rely upon the good faith of the document. In the case of precognitions and everything else post litam motam (and precognitions are really of that nature), the principle of that exception is clear. In the first place, the evidence is of a kind which has been filtered through professional hands. It is adduced for the purpose of supporting one side, one view, of a disputed and

litigated state of facts. It is wanting in the element of impartiality. Under those circumstances it is a safe rule to exclude it, except when the evidence has been so taken and between such parties as to make it admissible upon a principle common to the law of England and of Scotland. When you have once got so far as that, it follows, I think, that, as was decided in the *Aberdeen Case* (1), you cannot play fast and loose with the principle of the exception; not admitting the depositions taken in a particular litigation generally—you cannot allow a party to select a portion of them and to say, "This is in my favour, but it was given by my adversary," without allowing the adversary to shew what other evidence was given. That case seems to stand merely upon the general principle.

Then with regard to the case of *Madeline Smith* (2), I think that no more need be said than this, that though the rules of evidence may be the same in civil and in criminal cases, yet the principle of this exception that declarations are not to be admitted when there is such ground for suspecting that there may have been a purpose inconsistent with good faith or inconsistent with truth as to make it unsafe to receive them, should be applied with great strictness in criminal cases; and I do not hesitate to say that I should not disapprove of the exclusion in a criminal case of evidence as to which it could be suggested that it was open to any such suspicion, even if I might not be so clear as to the validity of the ground in a civil case, because of the tremendous consequences of its admission when life or death is in question. Besides that, in *Madeline Smith's Case* (2) there were these circumstances, that, the document being the private memoranda of the person and communicated to nobody, he never had accepted the responsibility of making the statement to anybody in such a way as to constitute him a witness, and he had possible motives at all events for a partial and not disinterested statement of the truth. That case, therefore, seems to me to disappear, and we are brought to the simple question, in this case which is now before us, whether there was anything here which can be called in a rational or intelligible sense a ground for suspecting the motive or the

(1) June 17, 1813. Hume's Dec. 502.

(2) 1857. 2 Irving's Justiciary Reports, 653.

H. L. (Sc.) 1885 — THE LAUDERDALE PEERAGE. — Earl of Selborne, L.C.

honesty, or repelling the presumption of sincerity and honesty, of the declaration. I see nothing of that sort. There was really no lis mota of any sort or kind; and the fact that the document was made for a purpose instead of making it of less weight, to my mind seems to make it of more; because the purpose was an obvious and legitimate one, corroborating and not discrediting the presumption of honesty and truth.

LORD BLACKBURN:—

I am of the same opinion. I take it that the general rule of the law of Scotland, as of most other countries, is this, that the evidence of a person should be given subject to cross-examination, and also be taken upon oath, but mainly that it should be subject to cross-examination by the party against whom it is given. But in the law of Scotland there is the exception made, that when the witness, that is to say, the person who could prove the matter, subject to cross-examination, if he had been alive, is dead, and you cannot call the party to give the evidence himself, subject to cross-examination, you are to receive such a document as this as hearsay evidence (I should have thought it a better word to call it secondary evidence), provided that the circumstances under which he made the statement were such as to raise a fair and reasonable presumption that he was then telling the story truly, it is in that case admissible.

Now I think myself that, as far as the authorities go, probably (I am not sure whether it is necessary to say so much), a statement made by a deceased person as to a matter, which, if true, would lie within his knowledge, would be primâ facie admissible, valeat quantum, because primâ facie the circumstances under which it was made would be such that he probably spoke the truth; it is for the tribunal to consider the weight of the evidence, and to say whether they will give credit to it or not. That would probably be generally the case; but the decisions in the Courts of Scotland seem to shew this, that the circumstances may be shewn to be of a particular kind, such as the Lord Justice Clerk says in the case of *Macdonald* v. *Union Bank* (1), that "he could not hold that the precognition so represents the fair and

(1) March 29, 1864. 2 Court Sess. Cas. 3rd Series, 963, at p. 969.

spontaneous statements of the person deceased as to entitle it to admission at all;" and similar language has been used by other Judges. That, I take it, is the ground upon which it goes. Where it is shewn that the statement of the deceased person was made under circumstances which cast that suspicion upon it, the evidence is not receivable. A precognition is of that nature. Other circumstances there may be which are of a similar nature. It is not necessary to determine that in the present question at all, but it is necessary to consider whether as far as suspicion goes this certificate by the Rev. Dr. John Ogilvie is subject to a suspicion of that kind which would prevent its being admissible. It will be hereafter for your Lordships to decide, if it is admitted (as I think it ought to be admitted), what weight is to be given to it, weighing it against what is to be said by the other side, and against what evidence there may be. But as it stands, is there anything in the circumstances to prevent its being admissible? Evidence is given to shew that Dr. John Ogilvie was the clergyman of the parish at this time. Evidence is given that this certificate was signed by him six months afterwards. It is erroneously put upon the affidavit before the mayor (upon which I will say nothing at present), as if it had been dated at the time of the marriage; it is not so; it was not so dated, and I think on looking at the document itself one must take it to be the fact that Dr. Ogilvie did sign the certificate before the mayor, and did so with the view to the mere authentication of it valeat quantum, in order that it should then be preserved, and used as evidence of the marriage valeat quantum also. Is there anything in that to raise a suspicion against his doing the thing fairly? There does not appear to me to be anything to do so. In the first place it is in writing; and some words have been used by different judges at different times as if it was thought that a statement in writing was not admissible when a similar statement by word of mouth would be. I cannot conceive that any such ground as that can prevail. Then, again, it was said that the document is objectionable, because it was sworn to before the mayor. I can perfectly understand that it being sworn to before the mayor of New York might under some circumstances shew that it was in the nature of a precognition, or was subject to the

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE. Lord Blackburn.

same objection as a precognition. But to say that in any case taking a voluntary oath to the truth of the statement afterwards would render inadmissible that which would have been admissible if made without an oath is not to me tenable, and I do not think that the only case referred to as an authority bearing upon it, namely, the case of the town of Aberdeen (1), really bears that out. The voluntary oath made it no better, but I do not see that it made it any worse.

Then the only remaining thing to be considered is, the circumstances under which the document was made. It was made for a purpose in one sense. Dr. Ogilvie, I have no doubt, was requested (probably by the lady or the lady's friends) to give this certificate, and to give it before the mayor of New York, who was then to certify it, in order that it might be used whenever there was any occasion rendering it necessary for her to shew that she had been married. I do not doubt that that was the purpose with which it was done, and if it could be established that you are to reject evidence of this sort whenever it appears to have been given for a purpose in that sense, and that in fact you are only to receive idle gossip and matter said when there was no occasion for the man to think of what he was saying, except that he should not speak rashly, and that you should always reject it whenever it appeared to have been made for the purpose of stating, and, as far as he could, proving, the fact, it would go further than any authority in the Scotch law, and it would be, I think, extremely absurd. But there is no ground whatever for that. I think, as the Lord Advocate said, that if the circumstances under which it was made were such as to shew that it could be made either as in a precognition for the purpose of litigation, or for any similar purpose, it should be rejected altogether; but if it falls short of that, then I think that it should be received, and that it is for the tribunal afterwards to decide upon its weight.

LORD BRAMWELL concurred.

LORD FITZGERALD:—

I wish to express my concurrence in the decision announced, and for the reasons stated by my noble and learned friend oppo-

(1) June 17, 1813. Hume, Dec. 502.

site (Lord Watson), and I would not add anything but that the rule of the Committee is likely to affect the admissibility of other matters to be offered in evidence in the course of this inquiry.

We are dealing with a Scotch case relating to a Scotch title of honour, and I apprehend that we must deal with it in the same way as if the inquiry was as to Scotch real estate, and to be governed by the law and practice of Scotland. I have not the least doubt that, according to the law of evidence as administered in Scotland, which up to a very recent period stood upon a wider foundation and was much wiser than our own, both the certificate given by Dr. Ogilvie, the authenticity of which as to his handwriting has been already established, and the certificate of the mayor of New York are receivable and should be received in evidence; and it would be very unfortunate indeed if we were obliged to reject them. It might be difficult, in the case now before us, to give any evidence which would be one tithe so satisfactory to establish the fact of the disputed marriage as the certificate of Dr. Ogilvie.

I quite concur in the rule stated by my noble and learned friend (Lord Watson), and shall not again refer to it. I wish to add, that I have only heard one ground as yet upon which the certificate of Dr. Ogilvie could be impeached, and that was that he was giving a certificate of a marriage which he had celebrated, which it was, apparently at least, his moral duty to have placed upon the register which then existed, but which he did not record. It is a common fact in the case that from 1764 to 1777, a period of thirteen years, no register was kept, and that puts me upon the inquiry as to how that may have happened. At present I am not entering upon the subject whether there was any legal obligation upon the rector or his assistant in this parish in New York to have kept a regular register of marriages. I am not aware how that is, but the fact is that no regular register was kept. Now, why was that? I may refer, as matter of history, to what had taken place at an anterior period in this country. During the civil wars and during the period of the Cromwellian usurpation great irregularities crept in. In many instances the parish clergyman was driven out of his cure. In many instances the register was destroyed, and the new register was kept (if any such was kept)

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE. Lord FitzGerald.

by a person who destroyed the ancient records of that parish. We know, as a matter of history, that in 1652 a Law Reform Committee was appointed, which took these matters into consideration, and upon their recommendation the Act of 1653 was passed. I do not know that that law was ever adopted in New York. Marriage was to be looked upon as a civil contract and to take place before a magistrate. I do not know, as I have said, that that law was ever adopted in New York, but it ceased to be law—it was modified by other Acts of Parliament, and we had to wait for a very long period before we secured a proper code of registration. New York was during the latter half of the seventeenth and the first half of the eighteenth century a very small community. It had passed from Dutch rule to English and again to Dutch rule, and finally became English. In such a young community, no doubt, there was considerable inattention to such observances as registering, and I cannot think that the absence of an entry of this marriage in the parish register in any degree affects the validity of, or the credibility to be given to this certificate of Dr. Ogilvie.

Therefore, for the present I am clearly of opinion that the certificate itself ought to be received as well as the authentication by the mayor, subject, of course, to any observations which may be made upon it afterwards as detracting from its weight.

The documents were received.

An officially certified copy from New York of the will of Colonel Richard Maitland, dated the 16th of February, 1771, and proved at New York on the 7th of September, 1772, by William McAdam, the Reverend John Ogilvie, and Dr. William Bruce, three of the executors, was produced and handed in, and was as follows:—

"In the name of God, Amen!

"I, the Honourable Richard Maitland, Deputy Adjutant General in and for North America, being at present of sound and disposing mind, memory, and understanding, and calling to mind the uncertainty of life and certainty of Death, do therefore make and ordain this my last Will and Testament in manner and form following, that is to say: I commit my Soul to God, my merciful Creator, and my body to the Earth to be decently buried by my executors, in hopes of a joyful resurrection to eternal life through the merits & satisfaction

of Christ my Redeemer, and for my worldly estate I give and dispose thereof, in manner following, that is to say: All my estate both real and personal, whatsoever and wheresoever, I give, devise, and bequeath unto my two natural sons, Richard and Peter, children of Mary M°Adam, and to the said Mary M°Adam and the child with which she is now pregnant, and to their several and respective heirs, executors, administrators, and assigns for ever, equally to be divided amongst them, share and share alike. To have and to hold, one full and equal undivided fourth part of all my estate both real and personal, unto each of them the said Richard and Peter, children of the said Mary M°Adam, and the said Mary M°Adam, and the child wherewith she, the said Mary is now pregnant, and their heirs, executors, administrators, and assigns respectively.

"Item. In case either of my said two natural sons Richard or Peter or the said child wherewith she, the said Mary M°Adam is now pregnant, should happen to die before their arrival at or attaining to the age of Twenty-one years and without lawful issue, then and in such case I give, devise, and bequeath the part or parts share or shares of the child or children so dying, unto and amongst the survivors and survivor of them, the said Richard and Peter, and the said child wherewith the said Mary is now pregnant, and to their heirs and assigns for ever, share and share alike.

"Item. I do hereby request, desire, authorize, & empower my executors hereinafter named, or such of them as take upon them the execution of this my will to manage, govern, and direct my estate in such manner as they or the major part of them shall think most for the advantage of my devisees.

"And in case my executors or such of them, as shall take upon them the execution of this my will or the major part thereof shall think fit or esteem it for the Benefit of my devisees, I do hereby desire, authorize, and empower my said executors and the survivors or survivor of them who shall at any time take upon them the execution of this my last Will and Testament, to grant, bargain, sell, aliene, release, convey, assure and confirm all or any part or parts of my real estate for such sum or sums of money or other price or value as they shall think proper to any purchasor or purchasors, his, her, or their heirs, and assigns for ever in fee simple and to give good & sufficient deeds, releases, and conveyances, to such purchasor or purchasors for the same.

And Lastly, I do hereby nominate, constitute, and appoint my beloved brother the Honourable Collonel Alexander Maitland, and my friends, Mr. William M°Adam, of the City of New York, merchant, the Reverend John Ogilvie, of the said City, Thomas Montcrieffe, Esq., Major of Brigade, and Dr. William Bruce, of the Royal Regiment of Artillery, and the survivors and survivor of them to be Executors and Executor of this my last Will and Testament, hereby revoking all former or other Will or Wills by me at any time made, and confirming and ratifying this as my last Will and only Testament. In witness, whereof, &c.,

"RICH'D MAITLAND (L.S.)

"Signed, sealed, published, &c., in the presence of the testator, at his request, and in the presence of each other,

"JOHN M°DOWALL.
"AND: ANDERSON.
"DSAL FRASER."

Mr. William Wood examined, said he was one of the executors

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE.

of the late John Maitland, who was a son of Sir Alexander Maitland Gibson (1), and consequently the great-uncle of the present counter-claimant, Sir James Gibson Maitland. He (the witness) was for some years Mr. John Maitland's partner. He produced a bound manuscript volume found in the repositories of John Maitland by his widow, the witness's sister, and also a press copy letter-book. He stated that the following entry on the first page of the manuscript volume was in the handwriting of John Maitland:—

"Copy correspondence, &c., connected with the Honourable Colonel Richard Maitland, who died in America, on the 13th of July, 1772 (see page 50), having two days prior to his death married to Mary McAdam by whom he had four children," and "Note, October, 1849. The mass of original letters and documents from which what follows has now been selected, was on the death of Sir A. C. Maitland Gibson, of Clifton Hall, in 1848, handed by me to the present Sir A. C. G. Maitland, Bart. J. M. 1849."

Pages 90, 91, and 92, were also in the handwriting of John Maitland. That from page 1 to the top of page 58 was in the handwriting of a clerk of Mr. Maitland's named Charles Robertson, and witness. From page 61 to page 89 was in the handwriting of another clerk named Robert Murray. This statement was corroborated by Mr. Charles Robertson, who said he went to Mr. John Maitland in May, 1848, and that by directions of Mr. John Maitland he copied some of the letters in the book. At the time the copies were made they were made not in a book but on loose sheets of paper. He copied them from sheets of common letter-paper which had evidently passed through the post; and the copying was done in the summer of 1848. He also identified his own handwriting on pages 58 and 59.

(1) General the Hon. Alexander Maitland, fifth son of Charles 6th Earl, was created a baronet in 1818, and died in 1820. He was succeeded by his son Sir Alexander Charles Maitland (Gibson) who married the daughter and heiress of Gibson Wright, of Clifton-hall, and died February, 1848. His eldest son Alexander Gibson Maitland predeceasing him in 1828, he was succeeded by his grandson Sir Alexander Charles Ramsay Gibson Maitland, as third baronet. He died in 1876, and the counter-claimant is his eldest surviving son.

At a subsequent sitting of the committee the witness stated he read the original letters out to Robert Murray, when he copied them, at the same period that he made the other copies.

Sir *F. Herschell*, S.G., maintained that the note now proved to be in the handwriting of Mr. John Maitland was primâ facie evidence that the originals of the letters then transcribed were handed by Mr. John Maitland to Sir A. C. G. Maitland. And a press copy letter also proved to be in John Maitland's handwriting to Sir Alexander Gibson Maitland of date the 13th of December, 1848, was what that note of October, 1849, referred to. And whether that letter was sent or not, it being proved to be in his handwriting, and John Maitland being a member of the branch of that family to which the counter-claimant belongs, it was clearly evidence.

Letter read as follows:—

"My dear Sandy,—As you are the party who might possibly be interested in them, I send you in a leather bag a quantity of letters and papers connected with my grand-uncle the Honourable Richard Maitland, who seems to have died in America on the 13th of July, 1772. Two days before his death he appears to have married Mary McAdam, by whom he had had three sons, then all alive, and, she was also, it seems, in the family way at the time of his death, and this ended sometime after in the appearance of a daughter [sic]."

"I need not pretend here to go into a history of these sons, for though I have read the whole large quantity of letters, there is not much that is important in reference to their after education, and they were in after life sufficiently identified and widely known. I found these papers in one large bundle, not in any kind of arrangement by dates or otherways. They should all be preserved, but by far the larger portion can be of no direct value in any circumstances; by far the larger portion of the letters are from Colonel Richard himself to my grandfather, his brother, and are of date some years prior to his death, and relate to commonplace subjects of interest at the time. Seeing the whole was in no sort of order, all I have done in the way of arrangement was to set aside such as bear on the point to which I refer, and some other letters and papers that are merely curious, and these I have put into the brown paper cover in case you fancy to look through them."

The Solicitor-General for Scotland (*Asher*, Q.C.):—

This letter not having been proved to have been sent, was not in the position of a communication made by Mr. Maitland to any one, and could hardly be taken as his statement. As to the copy of the letters, the question was whether Mr. John Maitland's

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE.

docket was evidence of the disposal of the principals. The docket is the only suggested evidence of those principals having been passed to Sir Alexander C. G. Maitland. According to Scottish practice, when a copy is tendered it would be immediately objected to as not being evidence at all. It may be made evidence by shewing that a principal existed, of which that was a copy, and that that principal is not extant. The legal question is whether such a memorandum in a book, communicated to no one, is evidence of the fact therein stated.

[LORD BLACKBURN:—This is communicated. No one can doubt that John Maitland wrote that as a memorandum to be seen by any one who looked at the book, I do not say that it proves that he sent the documents, but secondary evidence will be equally receivable if in any way the document is lost.]

Sir *F. Herschell*, S.G.:—By Scotch law the statement that he had handed those documents to Sir Alexander Charles Gibson Maitland is evidence that he did so, because he is dead.

Thomasina, dowager Lady Maitland, examined, stated she was the widow of Sir Alexander Charles Ramsay Maitland, and executrix under his will, and that she had searched amongst the papers that she received to see if she could find the original letters of which copies were contained in the manuscript, but she was unable to find any such original letters.

The Solicitor-General for Scotland (*Asher*, Q.C.):—

There was a bag of papers, that was the peculiarity of it, which the agents have, and it is sealed up and kept in a safe containing the Lauderdale papers; and there is not one of these letters in that bag.

LORD BLACKBURN:—

I think in the present state of things we must take it that there is evidence here that the documents were sent to the late Sir Alexander Charles Gibson Maitland, but only evidence that they were sent; and that, that being so, the claimant has done what he can to get the documents. If the other side can bring any other evidence to shew that the documents never reached Sir

Alexander Charles Gibson Maitland, and that all the documents that did reach him are still in existence, and do not include these particular documents, or any of them, that would rebut it; but at present it stands that there is evidence that these documents have been sent to Sir Alexander Charles Gibson Maitland, and that this book contains a copy of them; consequently, to that extent, they should be received, and I should so propose.

LORD WATSON:—

I am of the same opinion. There is no allegation that these originals are extant. The suggestion made is that there is not sufficient primâ facie evidence offered by the claimant to shew that the originals are lost or inaccessible, so as to make it competent to put in copies. If you give faith to the statements made under the hand of the late Mr. John Maitland, he sent the whole of the documents in his possession. But he made a separation. Those that he considered as important and therefore copied, he put into a separate envelope. It is not disputed that some documents answering the description given in the memorandum came into the possession of Sir Alexander Charles Gibson Maitland; and I see no reason to suppose that the rest did not also find their way to him. That inference may be rebutted, but I think the claimant, who is tendering evidence, has meantime done quite sufficient to entitle him to have these copies admitted as secondary evidence. Of course, if at any time it should turn out, or if evidence is led on the other side to shew, that the principals exist and are accessible, he could put them in, and in that case they would at once supersede the copies (1).

LORD BRAMWELL:—

My Lords, I am of the same opinion. It has continually happened in the Courts of Law in England that evidence has been

(1) It was agreed between counsel that the deposition of the widow and executrix of John Maitland taken in the Scotch action should be taken as given under a commission of this House for the purpose of proving that she made a search for these original letters. But these depositions having been read at a subsequent sitting of the Committee, they were held not to be explicit enough as to the point of her having made a search, and a further search was ordered, and made by Mr. Wood, but the original letters in question were not found.

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE.

given that a document is in the possession of the defendant, and there is evidence to shew that a notice to produce is given. If the matter stood there, the document would be admissible in evidence; but it is open to the defendant, notwithstanding the evidence which has been given, to shew that in point of fact it did not reach him. I do not mean to say that that in fact could be done in this case, but the principle would be applicable; and, in the absence of any such evidence, it seems to me that there is sufficient to justify the admission of these documents.

The documents were admitted de bene esse.

Shiress Will, Q.C., proceeded to read from the manuscript volume a copy of a letter dated the 4th of August, 1772, to the testator's brother from the three accepting executors narrating the death of Richard and his marriage.

The Solicitor-General for Scotland (*Asher*, Q.C.), objected on the ground that no evidence had been tendered whatever to shew that the letter from which the copy was made was written by the persons whose names were upon it.

[EARL OF SELBORNE, L.C.:—A witness said that he copied these letters from original letters which, on the face of them, appeared to have passed through the post office, and taking with that evidence the fact that, as regards this particular letter, it comes out of the repositories of a member of the family descended from the Hon. Alexander Maitland, to whom the letter purports to have been addressed, I should think that is evidence. If the original letter were here, it would prove itself at this distance of time as having been written by the person by whom it purports primâ facie to have been written. Of course you might throw some doubt upon it which would require something additional. But a document, dated the 4th of August, 1772, produced in evidence in the year 1885, received by a member of the family, preserved by a member of the family, is, at least primâ facie, an authentic document.]

The copy of the letter if it is admitted and treated as equivalent to the principal, will then be held, according to the ruling with

regard to the certificate, to be hearsay of the persons who wrote the letter.

[EARL OF SELBORNE, L.C.:—Evidence of the truth of the statements in the letter only so far as to matters within their personal knowledge, and appearing to be so by the letter itself. LORD BLACKBURN:—Thirty years is the period in England, but this is 113 years ago. The letter purports to have been written 113 years ago, and that letter is produced from the custody (I am assuming that it amounts to that) of the descendant of the person to whom it was addressed; does not that afford primâ facie evidence that it was a genuine letter? LORD WATSON:—It is not disputed that those persons existed in America, and were the executors of Colonel Richard Maitland. The will proves that. Nor is it disputed that the persons to whom it was addressed and sent through the post, and those from whose repositories the copy now comes, were all members of the family of the deceased.]

This copy raises the question throughout the remainder of the evidence in this case, whether a letter being lost and a book containing a copy being produced, that book is admissible as evidence. The objection is that if the principal letter had been here it would not have been sufficient to tender the letter simply.

[EARL OF SELBORNE, L.C.:—But the principal letter is not here, and we must deal with the case as in a case of secondary evidence. Do you mean to say that there is not enough from which we can presume, if there is evidence elsewhere, that John Ogilvie, William Bruce, and William McAdam were the executors of that gentleman? If we have evidence of that, is there not enough from which we may presume that this letter was signed by those three persons, the executors? To say that you must prove the handwriting of a document which is lost would be to require an impossibility. It may be that in consequence of that secondary evidence is not to be received, but if the secondary evidence is received, it must be, I should think presumed, that the letter was what it purported to be, viz., the letter of these three persons.]

A copy may in certain circumstances be admissible, but in other circumstances it may not. The copyist may be produced,

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE.

and he may be asked from what he copied; he may know the handwriting of the person, the letter which he copied, or he may be shewn the handwriting of that person in another document, and asked: "Is that like the handwriting of the principal from which you made the copy?" There are various modes by which the handwriting of the original may be set up so as to validate the copy.

[LORD WATSON:—All this argument seems to proceed upon the assumption that if the principal had been here it would have been necessary for the party tendering it to prove the handwriting. For that proposition I know of no authority whatever.

LORD BLACKBURN:—Do you require more to make an ancient document admissible than to shew that it purports to be a document, and that it is produced from the custody in which it would naturally be kept.]

There is a rule in England as to thirty years, but there is no such rule in Scotland, though it is conceded it is a question of circumstances how far a letter that is tendered is admissible or not—and its antiquity undoubtedly has to be taken into consideration. But, according to one general rule, an original letter does not prove itself, and in the next place, there is no arbitrary rule with regard to any period of time which dispenses with the necessity of proof. No doubt antiquated custom and all such elements go to make up the circumstances which will guide the Court in admitting or rejecting. Here there are no circumstances favouring the admissibility of this document with the single exception of antiquity.

[EARL OF SELBORNE, L.C.:—And the fact that the executors from whom it purports to come were in point of fact John Ogilvie, William Bruce, and William McAdam.]

That is conceded, but that does not prove that those executors concurred in writing a letter in these terms; which is another question to be considered.

Sir *F. Herschell*, S.G.:—The next document in the book is headed in what is said to be John Maitland's writing: "Copy letter, General Sir A. Maitland to his brother Richard's executors," and that acknowledges the letter in question.

EARL OF SELBORNE, L.C.:—The letter is clearly receivable, subject to any observations upon its value.

The will of Richard Maitland was also copied into this manuscript book and this note was written on the back of the copy of the will:—

"Note on back of will":—"It appears a very extraordinary omission that the son John should not be named in this will, while the accompanying letters prove by the authority of the trustees and executors thereto added, that he, with the other two eldest sons, were living at the time of Col. Richard Maitland's marriage—just before he died—and it is a matter of notoriety amongst the family, that the late Colonel James Maitland, who was killed in India, last war, was the youngest of all, they being Richard, Peter, John, James. This was found in the repositories of General S. A. Maitland, our father, after his death:—A. C. Maitland Gibson, Fred Maitland, Totteridge, the 29th day of March, 1820."

Shiress Will, Q.C., read from the manuscript book a copy of a letter from Mr. William McAdam to Colonel the Hon. Alexander Maitland, dated New York, the 4th of August, 1772, narrating that it accompanied a letter from the executors named in the will, and suggesting that the widow should obtain a pension; that Richard Maitland had her very young and that she behaved very well. It also corroborated the facts as to the children being born before wedlock; and that he was a witness with Dr. Bruce, at his dying friend's request, to the ceremony of marriage.

Shiress Will, Q.C., proposed to read from the same volume a draft or copy letter from Colonel the Hon. Alexander Maitland, to William McAdam, acknowledging the receipt of the two letters of the 4th of August, 1772. At the top of the copy there was this note in John Maitland's handwriting: "Note.—This seems to be the draft of the general's reply in the handwriting of his wife." "J. M."

The Solicitor-General for Scotland (*Asher*, Q.C.,) objected to this being received. A copy of a draft in the handwriting of this lady in John Maitland's repositories could not be accepted as evidence.

EARL OF SELBORNE, L.C.:—Valeat quantum it must be taken to be a draft letter written by the lady on her husband's behalf with a view to sending a letter which may or may not have been sent.

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE.

Sir *F. Herschell*, S.G., also tendered a copy of a letter from the manuscript volume, from Colonel Richard Maitland's widow, in which she signed herself "Mary Maitland." Also an original letter purporting to be from the Hon. John Maitland to his brother, Lord Lauderdale, dated New Brunswick, 19th of March, 1777, in which he says: "In one of the towns we took in this province I found our brother Dick's widow."

A witness also produced from the Public Record Office, War Office Records, "Widow's Compassion Papers, 1773," a certificate dated the 18th of June, 1773, signed "G. Cary," and "Cox & Mair," agents, and at the foot of this certificate there was a deposition by "Mary Maitland" as to her being the lawful widow of Col. Richard Maitland, sworn before Mr. Whitehead Hicks.

The Solicitor-General for Scotland (*Asher*, Q.C.) objected, as not admissible as proving the facts stated therein.

The document was admitted as forming part of the res gestæ of the grant of a pension.

To the copy of a letter from Ann McAdam, wife of William McAdam, New York, dated the 1st of May, 1787, there was attached this note:—"This was found in the repositories of General Sir A. Maitland, after his death by us, his two sons, and clearly shews the sons of Colonel Richard (John and James) were the youngest, but what is most material, James is hereby proven (as was clearly understood before) to be the youngest of all. —A. C. Maitland Gibson, Fred. Maitland. Totteridge, 29th March, 1820."

There was also in the manuscript book, a memorandum proved to be in the handwriting of John Maitland:—

"A memorandum in the handwriting of Sir A. C. Maitland Gibson, of Clifton-hall, Baronet. Memorandum respecting the late Richard Maitland's marriage in America, received from Captain Peter Maitland, of Balgreggan.—'By a resolve of assembly (in consquence of a petition dated the 24th of March, 1786) of the State of New York, dated 24th March, 1786, signed New York, February 1st, 1787, by John McKessan, clerk, also signed by Ann McAdam, Judith Bruce, Margt. Ogilvie. It appears that the three eldest sons of the late Col. Richard Maitland were born before wedlock.'"

[LORD WATSON:—*Munro* v. *Munro* (1) was not then decided.]

Sir *F. Herschell*, S.G., tendered in evidence a certified copy of an Act of the Legislature of the State of New York passed in April, 1787, for the purpose of vesting "the estate of Richard Maitland, deceased, in trustees for the payment of his debts." Presented by the widows of the three accepting executors and bearing this statement, "after making the same will the said Mary McAdam had issue one other son named John, and that soon thereafter she was intermarried with the said Richard Maitland, and had issue another son, named James, who was born after the decease of the said Richard Maitland."

The Solicitor-General for Scotland (*Asher*, Q.C.) and *Davey*, Q.C., submitted this Act could not be evidence in this inquiry. The utmost it came to was that certain statements were made by persons, who were not members of the family, to the legislature of New York; and the Chancellor having certified the Act might take place, a private Act was obtained. The claimant wanted the Act for the purpose of explaining the memorandum of Sir A. C. Maitland Gibson. The note to the memorandum, declaring that their eldest sons were born before wedlock, may be of value or not, but it is none the better for the personal statement.

LORD BLACKBURN:—It is not intelligible without the previous statement. Sir Alexander Maitland Gibson thought, rightly or wrongly, that the Act of the legislature of New York shewed to him that the three eldest sons of his uncle Richard were born before wedlock, and no doubt he believed at that time that James, who was born in wedlock, would come before them, but that the three sons who were born before wedlock would not come before them. It is important as only bearing on that.

The document was admitted.

Sir *F. Herschell*, S.G., tendered other letters to shew that Colonel Richard Maitland had not changed his domicil of origin, and also letters to prove that the children had been recognised by the Lauderdale family as Richard's offspring (2).

(1) 10 Aug. 1840. 1 Rob. App. 492, 584.

(2) For the effect of these letters, see Earl of Selborne's judgment, at p. 739.

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE.

Evidence was also produced of the descent of the claimant Major F. H. Maitland from Colonel Richard Maitland. As to law of the colony of New York in 1772, and whether to make a legal marriage it was necessary to have either banns or a license, American jurists gave evidence (1). The substantial effect of the evidence of those called for the claimant was, that the law prevailing in New York with regard to the requisites for a marriage in the year 1772 was the common law of England, as interpreted by the American Courts (2), i.e., that there should be a contract of marriage per verba de presenti; and that the 35th article of the Constitution of the State of New York, adopted in 1777, after the Revolution (3), shewed that the common law of England, as then understood, governed this subject. That there had been from 1691 down to the Revolution of the American colony, and subsequent to that period, a continuous series of publications embracing the Acts of the legislature of the colony and state of New York. But in none of these were the laws bound up in the book of 1665 and called "the Duke's Laws," nor the law of 1684, nor in fact any of the laws prior to 1691, printed. The Duke's laws and that of 1684 were printed for the first time in 1848, among other historical papers. Prior to 1664 the province of New York, then called New Netherlands, was possessed by the Dutch, whose custom it was to have either banns or license.

(1) The witnesses were the American minister, the Hon. E. J. Phelps, S. P. Nash, Esq., and C. Cary, of the American bar. The witnesses for the counter-claimant were R. L. Fowler, a member of the American bar, and Mr. G. F. Edmunds, chairman of the Judicial Committee of the Senate of the United States.

(2) 1809. *Fenton* v. *Reid*, 4 Johnston's Reports, 52. There the legal point in controversy took place between the years 1800 and 1806. No solemnization of marriage was shewn to have taken place, but the marriage was sustained upon proof of cohabitation and reputation, upon the assumption that by the common law of England, as adopted in New York, no ceremonial marriage was essential.

(3) The 35th Article of Constitution of the State of New York was as follows: "And this Convention doth further in the name and by the authority of the good people of this State, ordain, determine, and declare, that such parts of the Common law, and the Statute law of England, and Great Britain, and the Acts of the Legislature of the Colony of New York, as together did form the law of the said Colony on the 19th day of April, in the year of our Lord 1775, shall be and continue the law of this State, subject to such alterations and provisions as the Legislature of this State shall from time to time make concerning the same."

In 1664 the English conquered the country. The Dutch reoccupied it for a short time in 1673; and again evacuated it in 1674 (1).

The counter evidence was to the effect that the Duke's laws and the law of 1684, were in force in 1772, and required either banns or license as a pre-requisition to a valid marriage. That of the legal system prevailing in New York in 1772, with reference to marriage, the Act of 1684 was the fundamental law, so far as it did not repeal the portion of the Duke's laws relative to marriage. That the "Duke's Laws" were enacted pursuant to a patent from King Charles II. to his brother, the Duke of York (2), and a Commission from the Duke to Governor Nicolls. These laws were re-enacted in 1674, after the retrocession of the province, by special order. That the first assembly of freeholders met in 1683; and the public documents shewed that the marriage law of 1684 was passed at the second session of the first Assembly of 1683, in the year 1684. There was no subsequent meeting of the Assembly until the accession of William and Mary in 1691. There was no Act of the Assembly and the Council and Governor repealing the Act of 1684; but there was on the journals of the 24th of April, 1691, of the Lower House of Assembly a resolution, but nothing indicating that that resolution ever had been before the Council and Governor. The records shewed that from 1665 until the evacuation of the British forces in 1785, licenses were continually issued (3).

They produced an ordinance of the Director and Council of New Netherlands, 1654, regulating the publication of banns before marriage; also ordinance of 1658, to oblige persons to marry after their publication of their banns.

The Act of 1664 seemed to have been published on the 1st of March, 1664, at a general meeting at Hemsted, upon Long Island, by virtue of a commission from H.R.H. James, Duke of York and Albany, given to Col. Richard Nicolls, Deputy

(1) They referred to *Jackson* v. *Gilchrist*, 15 Johnston's Reports, 89; *Constantine* v. *Windle*, 6 Hill's Reports, 177; *Humbert* v. *Trinity Church*, 24 Wendell's Rep. at p. 625; Hoppman's Chan. Prac. (1851); the Revised Statutes of New York, 1830 ed.

(2) See Lord Watson's judgment, *post*, p. 751, for the material terms of the grant of the colony to the Duke of York.

(3) They cited Hoppman's Chancery Practice, p. 15.

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE.

Governor, bearing date the 2nd of April, 1664. That portion of the Act headed "marriage" was as follows: "Whereas by the law of England no marriage is lawfully consummated without a minister whose office it is to join the parties in matrimony after the banns thrice published in the church, or a license first had and obtained from some person thereunto authorized, all which formality cannot be duly practised in these parts. Yet to the end that a decent rule therein may be observed, it is ordained that from henceforth the names and surnames of each party who sue for marriage shall be publiquely read in their parish church or place of usual meeting, where they both then inhabit, three severall Lord's days successively. And where no church or meeting place shall happen to be, a publication in writing shall be fixed fourteen days before marriage upon three doors of each parish," &c., "unless they produce a lycence from the Governor, in both which cases, and not otherwise, it shall be lawful for any minister or for any justice of the peace to joyne the parties in marriage, provided that the said parties do purge themselves by oath before the minister or justice, that they are not under the bonds of matrimony to any other person living; and if it shall be after proved that either or both of the parties are purjured . . for the said purjury the party or parties offending shall be boored through the tongue with a rede hot iron, and moreover proceeded against as in case of adultery is provided." Under the heading "In what cases it shall not be punishable to re-marry" were these clauses:— "If any man shall hereafter presume to marry, contrary to these laws prescribed, the person offending shall be proceeded against as for adultery or fornication according to evidence. The children so begotten shall be reputed bastards, and the parents suffer such pains and penalties by fines or punishment as they have deserved." "If any justice of peace or minister shall presume to marry . . . or any other person," without banns, or without a special license, the justice or minister shall forfeit £20 and be put out of his office. Following this Act was "some alterations, amendments, and additions made in the laws, and confirmed at the general assize held in New York, the 28th and 29th of September and the 2nd, 3rd, and 4th days of October, 1665, and contained this: "In cases of adultery, all proceedings shall be

according to the lawes of England, which is by divorce (if sued) corporall punishment or fine and imprisonment." The Act of 1684 commenced: "Whereas the law of England," &c., as in Act of 1664, and then "Be it enacted by this General Assembly and by the authority of the same." And continued as in the earlier Act as to banns, and then, unless there is "a license, under the hand and seal of the governor, in all which cases and not otherwise it shall be lawful for any minister or justice of the peace within this province, to join together in matrimony the parties so published or producing a license as aforesaid: Provided always they bring a certificate from under the minister's hand that published them, or under the constable's hand on whose doors their names were affixed, which certificate shall be sent to the office of the registrar of the county, and there entered on record together with a certificate of their marriage," which is there to remain in perpetuam rei memoriam. Then the parties were to purge themselves by oath if required, that they are not under the bonds of matrimony; and instead of the clause as to boring through the tongue with a red hot iron, "if it shall afterwards happen to be proved that either or both of the said parties are perjured," "the said party or parties offending shall suffer as in cases of perjury and further be proceeded against as in cases of poligamy." There was no provision invalidating marriages or bastardising the children of such marriages, the only provision tending at all to that effect was this: "Be it further enacted by the authority aforesaid, that if any man shall presume to marry contrary to the law prescribed, the person offending shall be proceeded against as for fornication, and the minister or justice that married them shall forfeit twenty pounds and be suspended from his benefice and office." The Act then provided,—that nothing shall be intended to prejudice the manner of marriage among the Quakers: but their manner and form of marriage shall be judged lawful, provided they admit of none to marry that are restrained by the law of God: and that they permit none to be married within their congregation of any other persuasion than themselves, except by license or banns.

Certified copies of the above Acts were produced by the counter-claimant.

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE.

The resolution of the assembly passed in 1691 was that all the laws consented to by the general assembly under James, Duke of York, and the liberties and privileges therein contained granted to the people and declared to be their rights, not being observed, and not ratified or approved by H.R.H. or the late King, are now void and of none effect.

July 20, 1885. *Asher*, Q.C., for the counter-claimant, also produced, inter alia, evidence to shew that Colonel Richard Maitland had abandoned his Scotch domicil and had intended to settle in America. This consisted of letters, &c. In one of these letters he wrote from Charleston, the 3rd of February, 1772: "Yesterday was buried here a Mr. Hughes, who was Collector of the Customs for this port. It is an office worth £700 a year, but very few people chose to come to this climate on any consideration and would rather have half the money elsewhere. On the contrary, I am told by my doctors this is the only climate I can live in and that I shall never be able to serve as a soldier; that I would therefore desire of the prime minister is that he would appoint me collector of the Port of Charleston, and let him appoint any person to be Adjutant-General . . . that he pleases." "If he refuses I cannot remain as I am." In a letter of the 19th of February, 1772, he wrote from Charleston with reference to a petition he had sent in for leave to sell his regimental commission: "If his Lordship will allow me to sell both commissions at the rate Masterton (an officer who was allowed to sell his commission) did, I shall be able to pay my debts, sit down in a corner in a warm country and praise his Lordship ever afterwards." Substantially the like expressions occurred in other letters. Also evidence that he had received grants of land in America of 5000 acres under Royal Proclamation of the 7th of October, 1763; as a reduced officer on the 23rd of June, 1767; and a grant to William Sheriff, the said Richard Maitland and others (twenty-three persons in all) and their heirs, of 1000 acres each in the county of Albany, to form a township to be named Halesborough, dated the 12th of June, 1771; and also a grant to William Smith, Richard Maitland and others (twenty-five persons in all), of 30,000 acres on the west side of the Connecticut River in the

county of Gloucester, to make a township of Moortown, dated the 3rd of May, 1770; and also copy of an indenture of lease between Frederick Phillips and the Hon. Richard Maitland, and others (six in all), of mines in Phillipsburgh, New York, dated the 1st of October, 1771.

As evidence that the law of 1664-5 was sanctioned, they produced a mass of evidence including excerpts from ordinance by the governor and council of New York for regulating and establishing fees, &c., dated the 19th of October, 1710, respecting the fees for licenses of marriage and penal bond. They also produced extracts of proceedings in the prosecution of a man named Dan Sutton for bigamy the 5th of October, 1672, which was shortly as follows. Dan Sutton was charged with polygamy and confesses to marrying two wives. He denies his swearing before he had his license, but it was proved. The petition of his wife for divorce and to be free from the marriage was granted, and the last marriage being unlawful also declared null. For the perjury the prisoner was ordered to be bored through the tongue with a red hot iron, and for the adultery to be fined £40 and suffer imprisonment during pleasure of the governor. Also extract from the proceedings against Mary Jones in 1680 for having a bastard child, she pretending to be married before delivered; but without either license or publication. She was fined £5 or to receive twenty stripes on the back.

Sir *F. Herschell*, Q.C., summed up the case of Major F. H. Maitland.

The questions for consideration are, (1.) whether the marriage in New York has been established; (2.) whether at the time of that marriage Richard Maitland was a domiciled Scotsman. In face of the evidence given, it could not be disputed that there was a marriage de facto duly solemnized by a clergyman of the Church of England. The House had admitted the certificate given by Dr. Ogilvie, which was proved to be a certificate signed by that clergyman, and all the other facts—letters from New York to the family at home; the action taken afterwards by the members of the family, in relation to obtaining a pension for the widow; the letter written by a member of the family, a brother of

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE.

the deceased man, who had seen her, in which he speaks of her as Mrs. Maitland—confirm the certificate of marriage. Once prove a marriage de facto, which apart from the question of preliminaries is primâ facie valid,—then in the absence of all actual proof that the requisites were absent, it must be assumed that all things were rightly done, omnia præsumuntur rite esse acta: see *Piers* v. *Piers* (1), and Lord Cairns in *De Thoren* v. *Attorney-General* (2), and Lord Lyndhurst in *Morris* v. *Davies* (3).

Again, even if the above laws were in force, they did not invalidate a marriage which took place without either banns or license. For if either of these laws was in force, it must have been the Act of 1684. It commences with a similar recital as the Act of 1664, and deals with precisely the same subject, yet is perfectly independent of the Act of 1664. And though that Act provided for the publication of banns before marriage unless there is a license, there was no provision invalidating marriages or bastardising the children of such marriages. But unless it is expressly provided that the failure to comply with those requisites shall render a marriage null and void, the Courts will not so construe the Act as to render the marriage null: *King* v. *The Inhabitants of Birmingham* (4), and Dr. Lushington in *Catterall* v. *Sweetman* (5).

In 1691, the Lower House of Assembly purported to declare that all those Duke's laws had no force and validity, and the facts were extremely strong to shew that from that date onward everybody acted on the basis of those laws not having any effect. The cases of Sutton in 1672, and Mary Jones in 1680, produced by the counter-claimant as enforcements of the Duke's laws, were both before 1691, and no case after that date could be found. In fact there was no ground for coming to the conclusion that in 1772 the Duke's laws or that of 1684 prevailed in the colony of New York.

As to change of domicil, the case of the counter-claimant as to that was extremely shadowy, there was no ground for the allegation except that he obtained grants of land and spoke in his letters of wishing to live in a warm climate.

(1) 2 H. L. C. 331.
(2) 1 App. Cas. 686.
(3) 1837. 5 Cl. & F. 163.
(4) 8 B. & C. 29.
(5) 1 Rob. Ecc. Repts. at p. 321.

The counter-claimant contends that a death-bed marriage, although a valid marriage, will not legitimate children. But Bankton, 1. 5. 57. says, inter alia, "Law has prescribed no time certain, preceding one's death, for solemnizing marriage."

[EARL OF SELBORNE:—The same question would have arisen in the *Strathmore Case* (1), if it had been possible to raise it, but it was thought that the only question there was one of domicil. In that case Lord and Lady Strathmore were married within a day or so of his death, at St. George's, Hanover Square. It was held that he was domiciled in England. Upon the question of the succession to the peerage, no one according to my recollection ever entertained a doubt, that if he had been domiciled in Scotland, the succession would have gone to his child by the person he married.]

He submitted that Major Maitland had made out his claim.

Asher, Q.C., and *Davey*, Q.C., summed up the case of Sir A. R. Gibson Maitland:—

They submitted there was not sufficient weighty evidence to establish the fact of a marriage. With reference to a fact of that importance, upon which so much turns, it was necessary that the evidence should be of a complete and satisfactory kind. The certificate was not granted by a clergyman officially. It was not "marriage lines" such as may be given by a clergyman to parties whom he has married. It was simply a statement made by Dr. Ogilvie to the mayor of New York, six months after the alleged marriage was dissolved by the death of one of the parties. No doubt it was made by the man within whose knowledge the facts were, but it could not be raised higher than the hearsay of Dr. Ogilvie, transmitted through the mayor of New York. There was no sworn evidence at all before the House with reference to that hearsay, and the circumstances under which it was delivered.

[LORD WATSON:—If this certificate were all we know about Colonel Richard Maitland and Mary McAdam, I do not say it would be sufficient; but all the family seem to have believed that there was such a marriage.]

(1) See Riddell's Peerages, vol. 2, p. 848, and vol. 1, p. 418.

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE.

No doubt the fact was communicated; but the letters do not establish Dr. Ogilvie's certificate, they are merely copies found in a book of letters. In fact there was not a bit of evidence which was not of the character of written hearsay of a dead man.

Assuming, however, such a ceremony was performed, and that it was an essential pre-requisite to its validity that there should be banns or license. Here it could not be said the circumstances warranted that presumption. No doubt under the circumstances shewn to have existed in *Piers* v. *Piers* (1), the presumption would apply. But the circumstances there were very different. The marriage was conclusively proved, and the ordinary marriage certificate was granted at the time. Lady Piers herself was examined, and there was cohabitation following on the ceremony for a period of fifteen or twenty years, and one of the points specially founded on, as warranting the presumption, was that the parties by their acts at the time shewed that they believed such marriage to be a real and valid marriage. But the specialty of this case is that marriage was performed within forty-eight hours of the man's death. He never communicated the intention to marry to his own relatives, and Mr. McAdam says that the fact was unexpected to him. All these circumstances go to prove that it was a sudden thought, and that no license was obtained. Supposing there had been a license, and that the parties wished to preserve evidence of a regular marriage, it was very curious that no marriage lines had been produced. As to the question whether banns or license were in fact an essential pre-requisite, the contention of the claimant is, that in 1772 it was the marriage law of England, which had been the marriage law of England in 1670, when the colony was founded, that prevailed in New York. But they submitted that the common law of England never did prevail in New York. A document had been produced shewing the Dutch law had been in the province, and an order in council of New Netherlands, shewing that the proclamation of banns was required under the Dutch law; after the date of the conquest, the Duke of York's law came into operation, and it re-enacted the requisite of banns along with the requisite of a license. The question was at what point of time could the

(1) 2 H. L. C. 331.

English common law have taken effect in the province of New York prior to 1772. There was no doubt the province was conquered from the Dutch by the English in 1664. Lord Mansfield's propositions in *Campbell* v. *Hall* (1) seem plainly to establish that when the conquest from the Dutch of this province took place, the law, as it had been previously, would continue, if it had not been discontinued by the Crown. Now the Crown did give authority to the Duke of York to pass laws. These laws having been passed, were sent home for approval and confirmation, which was given, and from that date forward they became the positive law of the whole province, with respect to the matter dealt therein. They explicitly required the granting of licenses; and there was a continuous granting of these licenses precisely coincident in time with the passing of the law at the beginning and the abrogation of the law at the end by the declaration of independence. In these circumstances they submitted the laws were proved to have been in operation, and that their terms made banns or license an essential pre-requisite to the validity of the marriage.

On the question of domicil—during the last twelve years of his life there were sufficient indications of an intention on Colonel Richard Maitland's part to make the province of New York his home. He obtained grants of land and leases of mines in America; all this went to shew that he had abandoned all idea of returning to this country.

As to the death-bed marriage:—the right of succession to heritable property cannot be prejudiced by a person on his death-bed, within sixty days of his death. They did not contend that the marriage was invalid, but that the law relating to the succession of real property displaced the marriage for the purpose of succession. This question had been treated as an open one in the law of Scotland: Dirleton's Doubts and Steuart's Answers, pp. 180, 191, and Fraser's Parent and Child, p. 42. Craig was the only writer (excepting Bankton, who followed Craig) who said the contrary. But Craig was under a mistake: see Riddell's Law Tracts, 156. On the whole matter they submitted that the claimant had failed to make out his case.

(1) 1774. 1 Cowp. 204.

H. L. (Sc.) 1885 — THE LAUDERDALE PEERAGE.

The Lord Advocate (*Macdonald*, Q.C.) replied on the part of the Crown:—

All the circumstances tend to shew that the intention, both of the parties contracting the marriage and the clergyman who performed the ceremony, was that it should be valid. Two things were involved, to do justice to the children and to the woman who had been faithful to him so long. And, secondly, that his widow should be entitled to obtain a pension. Dr. Ogilvie was no novice in his duty as a clergyman, and he must be presumed to have desired to perform the marriage with every formality which should render it binding. If the Duke's laws were in force at the time and known to the people of the country, that increased the probability that the marriage was regularly gone through.

As to domicil, the position of Colonel Maitland down to his death, was that he was an officer in His Majesty's service, who was evidently prepared, if his health permitted, to serve in any part of the world. Had he left the army and had taken up his residence after that in any other part of the world than Scotland, there might have been a great deal in the suggestion that he never intended to return to his native country; but the fact of a soldier for services rendered to his country receiving a grant in a distant part of the dominions of his King created no presumption whatever that he had abandoned all intention of returning to his native land.

The law of death-bed, while it existed, was intended to prevent an existing heir-at-law, who upon the death of a man would succeed to his heritable estate, which he then possessed, being disinherited then and there, by a deed granted by the present owner of the lands. But that law had never been applied upon a question arising, not with an heir entitled at the time to succeed to the deceased, but in a question of succession of this kind.

July 22, 1885. EARL OF SELBORNE:—

My Lords, I believe your Lordships have heard as much of this case as you think necessary to enable you to determine it.

The case depends upon the single question, whether the peti-

tioner's great-grandfather, Lieutenant-Colonel Richard Maitland, brother of the seventh Earl of Lauderdale, was lawfully married at New York, on the 11th of July, 1772, to Mary McAdam, the mother of his children. That being proved, everything else is clear. He was by birth a domiciled Scotchman, and if he retained his domicil of origin down to the time of his marriage, the children, though previously born, and though the marriage was solemnized abroad, thereby became legitimate. The onus of proving a change of domicil, animo et facto, lies upon those who assert it. As to the factum, there is nothing but military service under the Crown of Great Britain for some years in British North America, and residence in New York in connexion with the duties of that service, for some time before and at the time of the marriage, and until his death, which happened two days afterwards. He had been an officer in the British army from 1744; holding from 1752 a commission as captain in the 43rd regiment, which he retained till his death. From 1760 to 1763 he was Deputy Adjutant-General to the Forces at Quebec, with the rank of lieutenant-colonel; and was not afterwards in active service. In 1763 he was "reduced"; but in 1764 he applied for and obtained the appointment of Deputy Adjutant-General to the British Forces in North America; and he retained that appointment till he died. These are facts certainly not indicative in themselves of a change of domicil; on the contrary, they are, at least primâ facie, unfavourable to it; though it is not necessary to say that a residence, even under such circumstances, for several years in New York, might not possibly be sufficient, if accompanied and explained by clear proof of an intention to settle there permanently, sine animo revertendi. But there is no trace of any such intention. It cannot be inferred from his acceptance of shares in several Crown grants of lands in British North America, granted to reduced officers (or others) by way of reward for military services, but on which lands he never settled or resided, nor appears to have ever contemplated settlement or residence. Nor can it be inferred from his becoming a shareholder in certain mining adventures in British North America, in the business or management of which he never took, or appears to have contemplated taking, any active part. His letters to his

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE. Earl of Selborne.

brother, Lord Lauderdale, and other members of his family in Great Britain (which were frequent) appear to me to be altogether opposed to the notion that he had any idea of settling permanently in the province of New York, or of relinquishing his domicil of origin. He clung with much tenacity to his status and rank as a British officer; in 1768 he wrote to his brother Alexander, expressing a wish to sell the commissions which he then held, and to purchase the lieutenant-colonelcy of a regiment, remaining adjutant-general; and again, in December, 1769, expressing a wish to be sent out to the East Indies, in command of troops. In September, 1771, he addressed a petition to the Crown, stating that he was suffering under an illness, which he was told would soon prove mortal, and asking leave, "in consideration of his long service, and those of his family, who had served the Crown in the first Offices of State for nine generations," to sell his company "and to remain adjutant-general with the rank of lieutenant-colonel in the army, which he then enjoyed, that in case he should recover, he might continue to serve the King without loss of rank." That request was refused in January, 1772. In February, 1772 (being then on leave at Charleston), he wrote, to his brother Alexander expressing a wish that the prime minister would appoint him collector of the port of Charleston; giving as his reason, "I am told by my doctors that this is the only climate I can live in, and that I shall never be able to serve as a soldier"; and adding, "but you will please to observe, I would not accept of being governor anywhere to the northward, for I could not live"; and, "if he refuses it, I must remain as I am, for I may never find such an opportunity in my lifetime." "Remaining as I am," did not mean domiciled in New York, to the northward; and in Charleston, or anywhere else to the south, he never had any settled home or residence. It is not because a critical state of health may oblige a man to go, or to remain with the prospect of dying, abroad, that he can be held to have abandoned, either animo or facto, his domicil of origin.

I leave my noble and learned friend, Lord Watson, to deal with the suggestion that a marriage, solemnized within two days of a man's death, when he was suffering from a mortal disease of which he died, does not, by the law of Scotland, so legitimise

children previously born as to enable them or their descendants to succeed to heritage by descent, in preference to remoter heirs. It is enough for me to say that this suggestion was admitted to be without support from authority. Such authority as there is upon the point appears to me to be against it; and no principle has been explained on which your Lordships can reasonably be asked now, for the first time, to lay down this as the law of Scotland.

The sole question then is, whether there is sufficient proof of a lawful marriage of Richard Maitland to Mary McAdam on the 11th of July, 1772. That there was a marriage in fact, by a clergyman, and according to the rites of the Church of England, is proved beyond doubt by the statement in writing, made within six months afterwards, by Dr. Ogilvie, the clergyman who actually solemnized it. That statement is good evidence by the law of Scotland, and (as such) was properly received by your Lordships. Being evidence, it must have weight, unless there is proof or reasonable ground for presumption to the contrary. Reasonable ground for presumption to the contrary there is none; for the statement must have been either true or fraudulent; the truth was necessarily within Dr. Ogilvie's own knowledge; he was a respectable man, officiating minister of one of the principal Episcopal churches in New York, no motive for fraud on his part can be suggested; and fraud is not to be presumed. And, so far from there being contrary evidence, the statement is corroborated in every way which could be expected at this distance of time. Colonel Richard Maitland's three executors (of whom Dr. Ogilvie was one) wrote to his brother Alexander within a month of his death (4th of August, 1772) announcing that event, and sending a copy of his will; and saying, "Two days before his death he married Mary McAdam who is mentioned in his will, by whom he has three sons alive, and she is now big with child. The reason he gave for this marriage was his disappointment in not selling his company to provide for the woman and children; and added that he thought himself bound in justice to the children and gratitude to her for her faithful and affectionate attention to and care of him in his tedious sickness." That letter was accompanied by one from Mr. William McAdam (no relation of the lady),

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE. Earl of Selborne.

who was himself another of the executors, and whom Richard Maitland had been accustomed to consult about his private affairs; in which the writer says, "I was witness, with Dr. William Bruce," (the third executor) "to the ceremony, at my dying friend's request." Mary McAdam was recognised as Richard Maitland's widow, both by the War Office authorities, who granted her a pension in that character, and by his family. His brother John visited her in America in 1777, and made a report of his visit (calling her "our brother Dick's widow") to Lord Lauderdale, on the 19th of March, 1777. The marriage was also recognised on various occasions, by other disinterested members of the family; and the children were received and brought up and advanced in the world upon the footing of legitimacy by their uncles, Lord Lauderdale included.

It was, however, argued that by a local law of the province of New York, passed in 1684 (or by one earlier still, of 1665, which however seems to me to have been virtually repealed, so far as relates to marriage, by that of 1684), the publication of banns or a license was made an indispensable preliminary to a lawful marriage; and that this continued to be the law of that province till after 1772. Both propositions are disputed, and fairly disputable; but supposing them to be made out, what follows? There is a total absence of proof, direct or indirect, that in this case there was no publication of banns and no license. No doubt there is not affirmative proof, by register or otherwise, of these things; but the registers of the marriages solemnized by the clergy of Trinity Church were not at that time regularly kept; and when they were kept, it was not the practice to make any entries in them as to banns or licenses. If these preliminaries were necessary, the rule "omnia præsumuntur rite acta" makes it your Lordships' duty to presume, under the circumstances of this case, that whatever was necessary was actually done. I cannot myself conceive any circumstances more properly requiring the application of that rule. No doubt this marriage was not (as in some of the cases mentioned at the bar) followed by cohabitation of the spouses, with habit and repute of married persons. That could not be, because the husband died within two days. But the whole object of Richard Maitland and Mary McAdam was to be lawfully

married; his, to do justice before his death to his children, and to their mother then expecting another child; hers, to obtain that status which nothing but lawful wedlock could confer. It cannot be supposed that they would knowingly neglect any legal requisite of marriage. Whatever occasion there may have been for promptitude in fulfilling their purpose, it was not done in a clandestine manner; the officiating minister was one of the husband's executors, and his other executors (one of them apparently his man of business) were witnesses to the ceremony. The letter of the 4th of August, 1772, shews that he had explained his intention to them beforehand. Dr. Ogilvie, beyond all question, must have known what was necessary for the validity of the marriage; it was his duty to solemnize it in a legal, and not in an illegal manner; and if the law of 1684 was in force, he would have been liable to heavy penalties if he had done otherwise. It cannot rationally be suggested that the legal conditions of marriage, whatever they were, were not generally understood by educated Englishmen resident at New York in 1772, and especially by the clergy of the Protestant Episcopal Church there. Dr. Ogilvie himself was married by license. All probability is against the supposition that these things could have been omitted if they were necessary; and there is nothing from which your Lordships ought to infer, either (as far as I can see), that there was not sufficient time for publication of banns after Richard Maitland's resolution was arrived at, or that there would, at any time before the day of the marriage, have been any difficulty in procuring a license. The question is raised after the lapse of more than a century, and after the death of every one who knew the real facts. Mary McAdam and her sons enjoyed the status of widow and of legitimate children respectively, from the 13th of July, 1772 (when Richard Maitland died) for the rest of their lives. The onus of proving that this marriage, solemnized de facto by a minister, and with the rites of the Church of England, was void for want of banns or license, and that (as a matter of fact) there was no publication of banns and no license, rests, in my opinion, upon those who say so. I cannot myself see that there is a scintilla of evidence to justify that conclusion.

I therefore move your Lordships to resolve that the petitioner,

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE.

Major Frederick Henry Maitland, has made out his claim to the Earldom of Lauderdale, and to the other titles, honours, and dignities, in the peerage of Scotland, which are mentioned in his petition.

LORD BLACKBURN:—

My Lords, I entirely concur in the conclusion arrived at by the noble and learned Earl and in almost everything that has been said by him, so much so that I shall add nothing except a few words upon the question of whether or not the marriage, which I think is proved here distinctly to have taken place, was according to the law of the province of New York as it existed in 1772.

It is to be remembered that the question is not what was the marriage law of the State of New York subsequently to 1772, although, inasmuch as after the Declaration of Independence the United States adopted all the previous legislation, it would be very material if it could be shewn that whilst the law of the state of New York was the same as that of the province of New York had been, any American Courts of the state of New York had held that a license or banns were essential to the validity of a marriage in that state. That would have shewn that in their opinion (and they certainly had very good means of knowing the fact) that had been the law of the province of New York. But so far from that being the case, we find that from 1692, when the first charter from William and Mary went out to New York, down to the time when the whole law of the state of New York, as one of the United States, was changed, in, I think, the year 1828, and when a quite different law was substituted,—during the whole of that period there is no indication of any decision by an American Court, and so far as I can perceive no indication of an opinion expressed by an American lawyer, that a marriage in New York would not be valid unless there was either a license or banns.

Now, my Lords, I first start with this proposition of law; it was questioned by Mr. Asher, I think, in the course of his argument, but I believe the authorities upon the matter are uniform: when the province of New York was founded by the English settlers who went out there, those English settlers carried with them all the immunities and privileges and laws of England.

The Englishmen in a province which had been so settled, were as free Englishmen, with as much privilege as those who remained in England. It is true that it is only the law of England as it was at that time that such settlers carry with them; subsequent legislation in England altering the law does not affect their rights unless it is expressly made to extend to the province or the colony. It is equally true that in all the books or dicta in which that rule is laid down there is always a qualification put upon it somewhat of this sort: the settlers who go out carry out the law so far as it is applicable to their new situation. That is a vague and general kind of phrase, but I think it has sound sense in it.

That being so, from the time when the colony of New York was first settled it had primâ facie the marriage law of England such as it was in the latter part of the seventeenth century, such as it was from the time of the accession of Charles II., we will say until the English Revolution in 1688; it is quite sufficient for my purpose to take those dates. There is no doubt whatever, I believe, on the part of any English lawyer, that a marriage in England at that time solemnized according to the form of the Church of England, and by a clergyman of the Church of England, such as Dr. John Ogilvie was, was valid to constitute matrimony: although if it was a clandestine or irregular marriage without banns or a license, the clergyman who performed it might be liable to censure from his ecclesiastical superior, and to punishment by his bishop, and probably to punishment in the Ecclesiastical Courts, yet the marriage was good.

Taking that, my Lords, as the first step, the real question seems to be: is there shewn to be here any ground for holding that the law of England, such as it was in England, had been modified in New York previously to 1772. From the time of the Revolution and the accession of William and Mary downwards, there is not a pretence for saying that it had been so modified. But it is said that it might have been changed or modified before, during the time when James, Duke of York, had had this province as a patentee by virtue of the authority from the Crown, given to him by his brother Charles II. Now I think that to some extent such changes or modifications of the

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE. Lord Blackburn.

law might have been made under a patent of that sort. I think it is pretty obvious, when you consider it, that when colonists first set out from this country to a new place they cannot be expected to take out with them all the machinery of the law; they cannot take out with them judges, and justices of the peace, and quarter sessions, and everything of that kind that is established in England; and consequently there is a time when they must do justice in a manner which may be described as rough and ready. I, therefore, by no means say that Charles II. had not full power by his prerogative to say that during the time whilst the necessity (I think that is the phrase used in the patent) of the colonists required it, they should make ordinances and such things for the purpose of governing the people at that time, provided always (and this provision is carefully inserted), that those ordinances are to be not inconsistent with or repugnant to the law of England. I think a tolerably good instance of what was done (I do not say that it would have been all quite right, or that everything could have been justified if it had been questioned) is afforded by a case which was cited, which occurred in the year 1674, when the Courts were not regularly formed, and when they proceeded in a very rough mode at once to divorce a man from his wife, to punish him for adultery, or rather for bigamy with a second wife, whom he had married, and to punish him for having committed perjury. At that time all that was quite right, except the divorce, as to which it may be doubted whether they had power to make one. In substance it was all right enough, but in form it was as rough as could be. I do not say that if there had been any proceedings taken against them for taking such steps they might not have been upset: but there would have been something to be said in favour of those who were responsible for the proceedings. But no one would for a moment suppose that such a proceeding as that would be carried on into the law of New York after it had become an established province, and still less that it would be carried on into the law of New York when it had become one of the United States.

Now, my Lords, I think that if under that authority the governor acting under the Duke of York, afterwards had taken

upon himself to say: "Here are men and women who want to be married—we have no bishops; we have no clergy;"—if that was the fact (I think probably they had, but it is possible to suppose that he should have thought that and said it), "they cannot be married according to the law of England. I will take upon myself to say that they shall be married in some particular way, although that may not be according to the law of England." Supposing he had done that, I should say it was within the spirit of the law, and whether it would be good or not would be a matter for after consideration. But if he had intentionally and deliberately said: "The law of England is that such and such a marriage shall be good, but I choose to say that here in New York it shall not be good unless something else is added," I am clear that that would have been ultrà vires of his authority, and even James II., although he considered his prerogative to be extremely extensive and carried it very far, would have hardly said that such a thing was within the authority which he could exercise.

Now, my Lords, with regard to what are called the Duke's laws, so far as they bear upon marriage, it seems to me that whatever they were intended to say about marriage otherwise, they were not intended to say that a marriage which would be good in England shall be bad if celebrated in New York. I do not think that was meant, and if it was, I am quite sure that it would not have been adopted. However, I do not think it was meant.

Then comes the law of 1684 which has been so often referred to. I doubt exceedingly, after what we have heard, whether it can be properly said that that law of 1684 was adopted into the law of the province of New York afterwards. It seems to have been pointedly repudiated by the first assembly which sat, and it seems to have been never, for about seventy or eighty years at all events, and I think more, printed as a law in any of the collections of the statutes that were printed, and I doubt if it was ever adopted as a law of New York at all. People who have been making historical researches after the law of New York was changed have discovered those documents, which have been produced before us, which I have no doubt are genuine documents, but I have not seen the slightest reason to think that this law had

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE. Lord Blackburn.

ever been incorporated into, or adopted in, the law of the province of New York, whilst it was a province, or of the state of New York before they changed their laws in 1828.

But supposing it had been, I think upon the construction of it we must remember what has been so pointedly and strongly laid down by many judges with regard to the law of marriage, that although it may be enacted that a marriage which could otherwise have been a good marriage, shall not in future be a good marriage unless there be this or that attached to it, the burden is upon those who say that such a thing has been enacted to show distinctly that it has been enacted. A case before Dr. Lushington was cited, in which he said that so strongly as that the words of the enactment should be positive and absolute in order to have that effect. I am inclined to think that he went a little too far if he said as much as that; but that the burden rests strongly upon those who deny the validity of a marriage to shew that the enactment clogged marriage with a condition precedent, and did not merely establish a penalty upon the persons who did what was irregular and improper, is I think quite clear.

My Lords, viewing it in that light, I think the law of 1684 did not do more than say that if a marriage is good in England, as this marriage by Dr. Ogilvie would unquestionably have been if it had taken place in England, nevertheless, if it is performed here, the minister who performs it shall be subject to penalties, unless there is a license or banns. And further, I think, it would almost follow as a self-evident matter that a clergyman who was performing a marriage in New York at that time, when the voyage from London occupied so long that he could not be reasonably expected to get a license from the bishop, who was his ecclesiastical superior, namely, the Bishop of London, I think it would almost follow that getting a license from the governor of the colony would be sufficient. Certainly the distance would have led the Bishop of London to think that he ought not to punish Dr. Ogilvie for an ecclesiastical irregularity in performing a marriage if he had a license from the governor.

My Lords, looking at it altogether, it appears to me to come to this: whether Dr. Ogilvie would have been punishable or not, the marriage was good if it was in fact performed. Taking that

view of it, the question whether there was a license or not does not arise. But I completely agree with what was said by the noble and learned Earl opposite as to the general principle, that where there is a marriage proved to have been solemnized de facto 110 years ago, by people who intended that it should be a good marriage, who did it all bonâ fide and openly, every presumption ought to be made in favour of anything that was requisite having been done, if there was anything requisite to give it validity and sanction. And consequently, if I thought that a license was necessary, which I do not, I think we ought to infer that there was a license.

I may observe that although I say that I do not think a license was necessary, it does not to my mind by any means follow that there was not, or might not be, good ground for thinking that a license was in fact taken out. Dr. Ogilvie, although he might probably think that he would not be much blamed for performing the marriage in this way without a license, would know that he was doing something at least irregular, if a license was required and one had not been obtained, and therefore that it would be much safer and better to get a license; and accordingly one would probably have been got. If the marriage had been questioned a year or two afterwards, that would be no reason, I think, for assuming contrary to the fact, that there had been a license; but it is an excellent reason at the end of 100 years for not upsetting the marriage without any evidence at all except merely the absence of affirmative evidence for presuming that there was not a license. However, my Lords, in my view of the case it is not necessary for us to decide that, because I feel very strongly that it has not been made out that a license was at all required.

My Lords, as to the rest of the case, I thoroughly agree in all that the noble and learned Earl opposite has said. It is not, I think, pretended, that the fact of its having been on death-bed has the effect of reducing the marriage itself, and the contention that it produced a result affecting the heirship seems to me utterly untenable. Upon that I will say nothing except that I thoroughly agree in what has been said, and in what I have no doubt will be said afterwards.

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE.

LORD WATSON:—

My Lords, that a ceremony of marriage between the Hon. Colonel Richard Maitland and Mary McAdam, was performed in the City of New York in America, on the 11th of July, 1772, according to the ritual of the Church of England, appears to me to be established beyond reasonable doubt. The fact of celebration is attested by the officiating clergyman, John Ogilvie, who had been duly admitted to Holy Orders in England, and was, at the time when the ceremony took place, one of the assistant ministers of Trinity Church, in the city of New York. The facts, which John Ogilvie thus affirmed by his subscription, were necessarily within his personal knowledge; and there is nothing whatever in the evidence tending to prove, or even to suggest, that the reverend gentleman had any motive to make, or did make, a false affirmation. On the contrary, the truth of the statement to which he set his signature is confirmed by all the evidence bearing upon this part of the case.

Colonel Maitland died on the 13th July, 1772, two days after the ceremony. His death and his marriage were communicated, at one and the same time, to his relatives in Scotland, by the Rev. John Ogilvie, William Bruce, and William McAdam, three of the executors appointed under his will; and William McAdam, who was admittedly an intimate acquaintance of the deceased, wrote to his brother, the Hon. Colonel Alexander Maitland, on the 4th of August, 1772, that he had been "witness, with Dr. Bruce, to the ceremony at my dying friend's request." Without going into details, it is sufficient to say that, in America, the ceremony of the 11th of July was fully recognised as having constituted a marriage between the deceased and Mary McAdam; and that the relations of the deceased, in Scotland, accepted the statement conveyed to them, that he and Mary McAdam were married persons. The evidence shews that, from 1772 until the recent origin of the present lis, the fact of their marriage was never questioned; although it does appear that some members of Colonel Richard Maitland's family entertained a doubt whether his marriage had in law the effect of legitimating his three sons born before wedlock, from one of whom the claimant, Major Maitland, is descended. At this distance of time, the family repute of

marriage is an important item of proof in support of the fact of marriage; but family belief or opinion as to the legal effect of that marriage on the status of the claimant, which is purely a question of law, cannot affect the decision of this case.

It has, however, been strenuously argued that, assuming the celebration of the marriage to be proved, it was not attended with those formalities which, according to the law which prevailed in the colony of New York in the year 1772, were necessary to its validity, in respect that it was not preceded by publication of banns or a license from the governor. It does not admit of dispute, that the marriage, though celebrated by a qualified minister, must yet be held to be invalid, if it can be shewn that, according to the lex loci, banns or a license were essential to the constitution of marriage, and that these preliminaries were neglected.

Notwithstanding the assistance which has been given us by able and erudite lawyers from the other side of the Atlantic, I have felt great difficulty in forming a satisfactory opinion as to the precise state of the marriage law in the colony of New York in the year 1772. That is not, in my opinion, so much a question of American as of English law; although American lawyers are probably more familiar than ourselves with the legal history of the colony; and the decisions of the Courts of New York, after the Declaration of Independence, might throw some light upon the law administered in the colony before their institution; but the American decisions to which we have been referred are of a date long subsequent to the Declaration of Independence, and are by no means conclusive; and the learned gentlemen who have been examined before us differ so much in opinion that I have satisfaction in thinking that it is not necessary to undertake the task of deciding between them. Apart altogether from the interesting controversy which is raised by their evidence, there appear to me to be sufficient materials for the decision of the present case.

His Majesty King Charles II., in making a grant of the colony to his brother the Duke of York in March, 1664, directed him to govern the inhabitants according to such laws, orders, and ordinances as should be by him established, and in default thereof, according to the good discretion of his deputies; but so as such

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE. Lord Watson.

ordinances and proceedings "be not contrary to but as near as conveniently may be agreeable to the laws, statutes, and government of this our realm of England." The terms of the letters patent clearly indicate that the law of England was to be the basis of the colonial law; and that no departure from it was to be permitted in any substantial particular. In my humble opinion, what your Lordships have to ascertain, for the purposes of this case, is not what law ought to have been enforced in the colony in 1772, but what law was de facto recognised and administered at that time. It would, in my opinion, be a monstrous proceeding to bastardise a whole generation of colonists, whose parents had married in reliance on the law as then administered, because the authorities to whom its administration was committed had misinterpreted, or failed to give effect to, the provisions of an ancient statute. The impression which I have derived from the evidence is, that in the year 1772 the Duke of York's Acts relating to marriage were not in force, and that the marriage law of the colony was substantially the same with that prevailing in England. One thing is certain, that some of the provisions of the Duke of York's Act of 1684, which it was the duty of the government to enforce, if the Act was in observance, such as the establishment of a county register for preserving in perpetuam rei memoriam all certificates of proclamation of banns and of marriage, were in complete abeyance.

On the assumption that, in 1772, the marriage law of the colony was regulated solely by the Duke's Act of 1684, which requires that marriage shall be preceded either by publication of banns or a license under the hand and seal of the governor, that Act does not appear to me to make nullity of a marriage entered into without those preliminaries, one of the penalties of its contravention. It enacts that: "if any man shall presume to marry contrary to the law prescribed, the person offending shall be proceeded against as for fornication." It does not enact that he shall be proceeded against "for fornication," of which offence he would undoubtedly have been guilty, if there was no marriage; but that he shall be subject to the same penalties as if he had committed the sin of fornication. The enactment superseded the previous law upon the same subject passed in 1665, which

expressly provided that the children born of such a marriage should be reputed bastards. The omission of that penalty in the Act of 1684 is very significant; and its significance is not diminished by the fact that one of the penalties attached to fornication was "by injoyning marriage." The only other penalties attached to fornication, were fine or corporal punishment, neither of which could imply that the marriage was to be annulled; and it appears to me to be impossible to hold that an injunction to marry, in the case of actual fornicators, must be read as an injunction to dissolve a marriage already contracted, in the case of persons who were to be punished in the same way as if they had been guilty of fornication.

I have only to add that, if I had been satisfied that the Duke of York's laws were in viridi observantiâ in 1772, and that according to these laws there could be no valid marriage without banns or license, that would not have altered my opinion as to the validity of the marriage solemnized between the Hon. Colonel Richard Maitland and Mary McAdam. The actual celebration and subsequent repute of marriage are completely established, and the legal presumption, which in these circumstances arises in favour of marriage, the opposing claimant cannot rebut, except by disproving every reasonable probability that there could have been an antecedent license. After what has been already said by your Lordships, it is unnecessary for me to demonstrate the utter failure of the opposing claimant to discharge himself of that onus. His own evidence as to the state of the registers of marriage documents in New York in 1772 seems to me to render it not only possible, but probable, that a license might have been duly issued and acted upon at that time, and that it might, notwithstanding, be impossible to trace the document in the year 1885.

I shall not occupy your Lordships' time by making comments upon the evidence, which was referred to at the Bar, for the purpose of shewing that, in July, 1772, Colonel Richard Maitland had lost his Scotch domicil. The evidence affords but scanty materials for maintaining such a proposition; and even the ingenuity of counsel failed to give it an aspect of plausibility.

The last plea advanced by the opposing claimant was, that, by

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE. Lord Watson.

the law of Scotland, Colonel Richard Maitland, being then on death-bed, could not by his marriage, in July, 1772, legitimise his three sons who had been previously born, to the prejudice of any future heir entitled to succeed to the honours of the Lauderdale family. That is a very remarkable plea, because, from the time when Sir Thomas Craig wrote his jus feudale, until it was abolished by Act of Parliament in 1871, the law of death-bed was, according to all the authorities, limited in its application to deeds, instruments, or writings executed in lecto to the prejudice of the heir alioquin successurus. The only shadow of authority produced in support of the plea, is a statement which occurs in a useful text-book published in 1866, to the effect that: "It is doubtful whether legitimation can take place, so as to exclude the heir-at-law, in heritage, when the marriage is entered into on death-bed." The Scotch authorities cited in the footnote to this text affirm the law as I have already stated it, though it appears from his answers to two of Dirleton's Doubts that Steuart thought the law ought to have been settled otherwise. The sole, and most inadequate reason, which the learned author assigns for throwing doubt upon the law which prevailed without question for three centuries, is the circumstance that the late Mr. Riddell (1), in the course of his antiquarian researches, discovered, or thought he had discovered, that Sir Thomas Craig was mistaken as to the facts of a case (and that not a litigated case) which he cites, not as settling, but as illustrating, the operation of the law.

I concur in the motion which has been proposed by the noble and learned Earl.

LORD BRAMWELL:—

My Lords, upon the question of domicil I will say nothing more than this, that it seems to me that there is absolutely not a particle of evidence to shew that Colonel Richard Maitland ever lost his domicil of origin and acquired another. Upon the question of the Scotch law it would be presumption in me to offer any opinion; all I will say is that I should not have expected anything so utterly unreasonable as the suggested law as to a

(1) See Riddell's Tracts, Legal, &c., p. 155, and Riddell on Peerages, vol. i. 321, n.

death-bed marriage to exist in Scotland, and I am glad to find that it does not.

Then, my Lords, with respect to the other question, as to the validity of the marriage. That a ceremony of marriage took place in point of fact between the two parties, Colonel Maitland and Mary McAdam, I really think there cannot be the least doubt, and it would be, in my opinion, idle to go into the particular evidence in support of it. Then the question is whether that marriage, which took place in fact, was a valid one or not. I do not think, with submission to my noble and learned friends opposite, that it is necessary to go into the question of the American law upon the subject, at least to go into the question of what was the law in the colony at the time. To say the truth, I rather deprecate doing so, because it would look as if one had some doubt, or it might be thought that one had some doubt, upon the sufficiency of the other reasons given by the noble and learned Earl by my side, (the Earl of Selborne), for holding this marriage to be a valid one.

My Lords, the maxim upon which we ought to act has been mentioned by his Lordship, and I will not repeat it. With regard to the question that those things took place which are to be presumed, the burden of proof rests upon those who say that they did not take place. It is to be presumed that the requisites of a valid marriage existed; it is for those who deny that to shew that they did not exist. My Lords, instead of their having shewn that to my satisfaction, I am satisfied upon the evidence that those requisites did exist. I am satisfied upon the evidence that there was either a publication of banns here or, what I should think much more probable, a license; and for these reasons. The practice, undoubtedly, was to have either banns or a license; that is proved beyond doubt. It is proved that Dr. Ogilvie himself was married by license. And the more Mr. Asher proved what I may call the necessity, or the propriety, or the practice of there being a license or banns in this case, the more, to my mind, he proved that there was either the one or the other of those two things, because, as the noble and learned Earl by my side has said, this was not a case in which the parties were hurriedly marrying to gratify some impatient passion, and perhaps taking no very great

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE. Lord Bramwell.

pains as to whether things were strictly conformable to rule or not, but it was a deliberate businesslike matter, done by persons who knew what they were doing, who knew the law, or at all events, knew what was supposed to be the law; it was not done clandestinely; and I think that if anybody were asked at this moment to say why, if the law or the practice was to have a license or a publication of banns, there was none in this case, it would be utterly impossible to give a reason why such license or banns did not exist in this particular case. The suggestion has been made that the marriage was upon death-bed and in somewhat of a hurry, but it was not in such a hurry that a license could not have been obtained. Then I say here is a quiet deliberate marriage, not clandestine, a marriage with witnesses, and entered into with the object of making the lady a valid widow, if I may use the expression, so as to entitle her to a pension, it seems to me impossible to suppose that under those circumstances the parties would not have provided themselves with the necessary license or banns.

Then, in addition to that, we have the evidence that the marriage was recognised, not in words but in fact, by all the relations and by the Crown, who treated the marriage as having been a marriage validly contracted.

Now what is the evidence against these considerations, which to my mind are as cogent as any which I ever met with in support of any proposition? The only suggestion is that there is no record either of banns or of a license, and there is not. Now that might be a valid consideration to some extent, (it would certainly not be all-powerful), if it were shewn that there was a regular record of marriages or of banns or licenses, and that there was an omission to mention the banns or license under which these people got married. But there is nothing of the kind. It is a remarkable circumstance that there is no record from which it can be said that a mention of these matters is missing. On the contrary, inasmuch as we see that there are some mentions of licenses granted and no mention of any bond, or evidence of any bond; and that there are other cases where there is evidence of a bond, but no evidence of a license, it follows that there were sometimes licenses of which there is no record, and sometimes

bonds of which there is no record. Then we have to suppose in this particular case, (and it is a reasonable supposition, too, considering the paucity of instances in which there are records of any of these transactions), that the thing took place, but that there was no record either of the license or of the bond which had been given. Then I say that we have in my opinion the most cogent considerations for the purpose of shewing that this was a valid marriage; and the evidence to shew that it was not, is absolutely worthless.

I am very glad to think your Lordships are coming to this conclusion, I will not say are driven to come to this conclusion, that is not the accurate word, I would rather say must come to this conclusion, because I believe that any other would be most mischievous.

LORD FITZGERALD:—

My Lords, I entirely concur. It appeared to me from the commencement of this investigation that there were two matters of fact from which, if they could be successfully established, the legal results were inevitable, notwithstanding the point which was raised at the conclusion as to the effect of a death-bed marriage. Those two facts were, first, that Colonel Richard Maitland, the ancestor of the claimant, had not parted with his domicil of origin, and next that a ceremony of marriage had been celebrated which, in the absence of proof to the contrary, we may call a legal marriage.

Upon the question of domicil, that is to say, that Colonel Richard Maitland had never lost his domicil of origin, the evidence is all one way. There is not a scintilla of evidence upon which you can found a valid argument that Colonel Richard Maitland had parted with his domicil of origin. And there is one document which has not been adverted to, which is possibly not important, but a little interesting in the case, upon this question of domicil. The widow after the death of her husband, when sending one of his children to Scotland, describes herself in a rather affecting letter as sending him to his "home," that is, his domicil; and rightly, because by the marriage of his parents he had acquired a domicil in Scotland, and therefore Scotland was

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE. Lord FitzGerald.

properly referred to in that letter as his home. The extent to which the evidence must be carried to put an end to the domicil of origin is explained in clear terms in the *Countess of Dalhousie's Case* (1), and in *Monro* v. *Monro* (2), both of which were in this House, and are reported in Clark and Finnelly. It is not upon light evidence or upon a light presumption that we can act, but it must clearly appear by unmistakable evidence that the party who has a domicil of origin intends to part with it, and intends to establish his domicil elsewhere. The case, therefore, is free from any difficulty upon the question of domicil; and at the time of this marriage Colonel Richard Maitland was a domiciled Scotchman, retaining his domicil of origin with all the consequences which, according to law, arose from it. Those consequences are explained in equally clear language in the *Countess of Dalhousie's Case* (1).

Now, my Lords, let us pass to the fact of this marriage. I do not intend to say more than a word or two about it. I never, in the course of my experience (and, unfortunately for myself, that has been a very long one) heard a case where, at the end of 112 years from the marriage, a marriage had been so clearly proved as it has been in this particular case. Now it was said that it was not registered. It is quite true that there is no proof of any register of this marriage; but from the evidence it appears that there is no register during a period of—I forget whether it is thirteen or sixteen years—but a period covering the eventful year of 1772.

It is also said that no marriage certificate was given at the time of the marriage by the officiating clergyman, Dr. Ogilvie. But that is an assumption which appears to me to be baseless. It is true that no certificate has been produced in proof; but are we at this distance of time to assume that none such was given? If given (and probably it was given) it would most likely have been given to the wife, it would have been preserved by her probably with precious care as her title-deed. But she died shortly afterwards somewhere in the interior; it was considerably over a century ago; and there is nothing before us to shew what became of the documents which she had, or what became of her papers.

(1) 7 Cl. & F. 817, 871. (2) 7 Cl. & F. 842.

She had before that time parted with two of her children, and there was one, or perhaps two, remaining with her to be taken care of; but there is nothing before us to tell us what became of her papers or of her family papers. Probably if they had been discovered the certificate would have been found among them. It may be said that conflicts with the subsequent certificate given six months afterwards by Dr. Ogilvie; but it appears to me not in the least to conflict with it, for that certificate, given by him and verified before the mayor of New York, was given for a different purpose altogether. The woman, of course, would not, in order to satisfy the requirements of the War Office, part with what to her would be a document of inestimable value, the marriage-lines as they are popularly called; nor would that be a document which, if sent forward to the War Department, would probably have been acted upon; but the requirement was a verified document, deposed to and verified upon oath, proving this marriage to have been a lawful marriage, upon which the War Office could act; and accordingly a certificate to be verified before the mayor was prepared, given for the purpose of entitling her, as the widow of Colonel Richard Maitland, to the small annuity which was then given to the widow of a gentleman who had served his country well, and in one of her most remarkable wars.

Then we have established before us the fact of a marriage, apparently legal, celebrated by an experienced officiating clergyman of the Church of England, because he had been so for sixteen or seventeen years; he was a minister, ordained in this country, and had gone out specially to Albany, and he had been for many years one of the officiating clergymen at the church of the Holy Trinity in New York.

It was said in argument, both by Mr. Asher and Mr. Davey, that in the case of a death-bed marriage of this kind, the ordinary maxim, "omnia præsumuntur rite esse acta," would not apply, because the marriage had not been, as it usually is, followed by cohabitation and recognition during the lifetime of both of the parties to the marriage. I took the liberty of reminding Mr. Davey, and he seemed rather startled at it, that that defect in the case was more than supplied by the fact that immediately after

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE. Lord FitzGerald.

the marriage, and for more than one hundred years afterwards, there was a recognition of it by the family, in fact, down to the death of the late Earl of Lauderdale. During all that time there was a family recognition, as appears upon the documentary evidence with the case, of the fact of the legality of this marriage, and that the woman, Mary McAdam, was the lawful widow of Colonel Richard Maitland.

There is one remarkable and somewhat interesting document in the case, namely, a letter from John Maitland, the brother of Colonel Richard Maitland, who was also an officer serving in America, written at the time when he was in New Brunswick. The force of which he was in command had in the course of the American war taken some small village or town in New Brunswick, and he writes with some surprise: "We found here our brother Dick's widow," describing her in that letter as the widow of his brother Dick. That recognition may be followed down through all the course of the documents. And coming by a jump at once to the year 1820, there is a remarkable document, namely, a memorandum signed on the 29th of March, 1820, by "A. C. Maitland Gibson" and "Frederick Maitland," both members of the family, in which she is recognised and spoken of as Mrs. Maitland, the widow of Richard. Again, you come to the printed book prepared so carefully by Mr. John Maitland, in which there is again recognised and recorded for family purposes this marriage of 1772. He has taken care to remark it by this statement, that three of the sons were born before the marriage, but that there was one, a fourth, who if he had lived would have been a legitimate son of that marriage. Now the meaning of that record is plain. It was not fully appreciated by the parties that a marriage in America of a domiciled Scotchman was a Scotch marriage, and that that marriage would carry with it all the consequences of a subsequent marriage in Scotland in legitimating the previously born children. It is plain that it was supposed then by the member of the family who was the compiler of that book, that that law did not apply to a marriage celebrated in America, and that by establishing it as a matter of family record that three of the children were born before marriage, they would be illegitimate and would be excluded from the succession, if it ever opened

to them, or to the descendants of any of those three elder-born children; the fourth, the younger one, having died without issue.

My Lords, upon those facts there can be no doubt that the principle applies which was so clearly laid down in strong and unmistakable language in the case of *Piers* v. *Piers* (1) in this House, which had already been clearly stated in an earlier branch of the case by Lord Plunket, that when the fact of a marriage, which was an apparently legal marriage, is established, the law presumes, until the contrary is plainly and clearly established, that all that was required to give it legal validity and force took place.

I should prefer, my Lords, in place of dealing either with the opinions of American lawyers or with the Duke's laws, or with the Act of 1684, to rest upon that settled and satisfactory doctrine of law in this case, that when once the fact of the celebration of an apparently legal marriage is proved, it is to be presumed that everything has been rightly done until the contrary is established by some unmistakable proof. It would be full of danger if we were in the slightest degree to shake that principle; and it is well illustrated by the present case, when as to a marriage which was undoubtedly celebrated in 1772, we are asked 112 years afterwards, on litigation arising, to call for proof of the publication of banns or the fact of the grant of a license, which in ninety-nine cases out of one hundred it would be a practical impossibility to give. I do not wish, therefore, by any observations which I make that that doctrine should be in the least degree shaken, and I shall only add that if it were necessary to deal with the Duke's laws or the Act of 1684, assuming that those laws were in force, I should myself require a great deal more than I have heard to establish to my satisfaction that under these laws the grant of a license or the publication of banns was what Mr. Asher called an essential pre-requisite, the want of which would invalidate the marriage. As far as I am at present able to form a judgment upon that part of the case, I should humbly concur in what has fallen from my noble and learned friend, Lord Blackburn, in which I understood my noble and learned friend, Lord Watson, also to concur.

I do not presume to deal much with the point relating to the

(1) 2 H. L. C. 331; 2 Dru. & W. 298.

H. L. (Sc.) 1885 THE LAUDERDALE PEERAGE. Lord FitzGerald.

effect of a death-bed marriage, but from what little I have read or know of the law of Scotland I always understood that peculiar doctrine of the law of Scotland to apply only to the reduction of deeds executed on death-bed, and that that doctrine has never yet been applied to a marriage. We have in England such a law, but it is an exceptional law by Act of Parliament, providing that certain deeds or wills may not take effect unless executed a given time before death. That is somewhat analogous. Certainly, so far as I can form a judgment, I entirely concur with what has fallen from my noble and learned friend near me (Lord Watson) upon this branch of Scotch law; I think that it would be inconsistent with right and justice if this death-bed doctrine could be carried to the extent of holding that a marriage, which was a valid marriage, and which undoubtedly legitimated the children, should not have the effect of giving them the rights of legitimate children, as against an heir to whom the succession opened 112 years after the death-bed marriage.

It was resolved,—

That Frederick Henry Maitland hath made out his claim to the titles, honours, and dignities of Earl of Lauderdale, Viscount of Lauderdale, Viscount Maitland, Lord Maitland of Thirlestane, and Thirlestane and Boltoun, in the Peerage of Scotland; and that this resolution should be reported to the House: The resolution was accordingly reported to the House and affirmed. And the same was reported to Her Majesty.

Lords' Journals, 22nd and 23rd July, 1885.

Agent for Major F. H. Maitland: *Edward Walmisley, for Gosling & Co., Solicitors*, and *Tods, Murray, & Jamieson, W.S., Edinburgh, Agents.*

Agents for Sir J. R. G. Maitland, Bart.: *Grahames, Currey, & Spens, for John Clerk Brodie & Sons, W.S., Edinburgh.*

[HOUSE OF LORDS.]

COMMITTEE FOR PRIVILEGES.

THE LOVAT PEERAGE.

H. L. (Sc.)
1885
June 25.

Held, that John Fraser of Carnarvonshire, mining engineer, had no right to the title, dignity, and honour of the Barony of Lovat in the Peerage of Scotland.

Evidence—Family Repute.

The general rule of the law of Scotland is that hearsay of a deceased person who, if alive, would have been a competent witness, is admissible evidence; but if the fact, to which the deceased testified, was such as he could not have had any special means of knowledge it is not receivable; and this applies to written as well as oral statements.

Deliberate statements made by deceased members of a family, who, if alive, could have been competent witnesses, are generally admissible—but a statement by one member of a family that B., another member, did a certain act, which act, if done at all, was done before the deceased narrator's birth, and there being nothing to shew what were his grounds of knowledge, and the fact not otherwise being proved, is not evidence that the particular act was done by any one; and though the statement cannot be altogether rejected, yet it can only be received as mere family tradition.

Statements Post litem Motam.

When a person leaves his native place and goes to another place to pursue a claim to an estate or title of nobility, and on his return tells certain persons what was said to him by persons connected with the family while so pursuing his inquiries; these statements are not admissible evidence.

Rule laid down in *Dysart Case* (6 App. Cas. p. 507) followed.

In 1826 the father of the present holder of the title of Lord Lovat, namely, Thomas Alexander Fraser, presented his petition to this House claiming that he was entitled to the Barony of Lovat in the Peerage of Scotland, as representing the Strichen branch of the Lovat family, unless the attainder of Simon, Lord Lovat, operated as a bar. In 1837 the present Lord Lovat's father was created Baron Lovat of Lovat in the Peerage of the United Kingdom.

On the 10th of July, 1854, an Act of Parliament was passed relieving the present Lord Lovat's father and the heirs male for the time being of the body of Alexander, sixth Lord Lovat, from the effects of the attainder of Simon, sometimes called twelfth Lord Lovat.

H. L. (Sc.) 1885 THE LOVAT PEERAGE.

In 1857 the Committee of Privileges resolved that the present Lord Lovat's father had made out his claim.

In 1885 John Fraser of Carnarvonshire, mining engineer, lodged a petition claiming the title of Lord Lovat in the peerage of Scotland, on the ground that he was heir male of Alexander, eldest son of Thomas of Beaufort, whose heirs male were admittedly entitled to succeed to the title before the Strichen branch. The contention of John Fraser and the facts bearing on the case are fully set out in the judgment of Lord Blackburn, and it will be only necessary here to state them shortly.

Undoubtedly John Fraser, the petitioner, is the lineal descendant of an Alexander Fraser, who was working in mines in Wales, and died there in 1776. But the main question was, whether the identity of that Alexander Fraser with the eldest son of Thomas of Beaufort could be established. The petitioner's case set out that on the death and failure of male issue of Hugh, eleventh Lord Lovat, in 1698, the succession to the barony opened to Thomas of Beaufort, son of Hugh, ninth Lord of Lovat, as nearest heir male. That this Thomas was married about 1665, and had a numerous family, but only three sons lived to the age of manhood, namely, Alexander, from whom the petitioner John Fraser claims, Simon, who was afterwards known as twelfth Lord Lovat, and was executed in 1747, and John, who died unmarried. Thomas Fraser of Beaufort, who died about 1698–9, had never openly assumed the title, as he was alleged to be under the ban of the law. It was alleged that in 1689 Alexander raised a force of clansmen to aid the rebellion under Viscount Dundee; and that at a subsequent period he attended some festivities in connection with a wedding near Beauly, but being incensed by a tune played by a musician, he in his passion struck the musician and killed him. He fled to Wales and found shelter in Wales in the mines of the Marquis of Powis; and, afraid to return, he devoted himself to mining for a livelihood, and married there in 1738 Elizabeth Edwards, and died in 1776 a very old man. He had issue four sons; the eldest, John, was born in 1740, and was the great-grandfather of the petitioner. This John Fraser went to Scotland about 1815 to prosecute his claim.

The present Lord Lovat lodged an opposing petition, alleging

that Alexander son of Thomas of Beaufort, from whom the claimant alleges he is descended, and who was the immediate elder brother of Simon, twelfth Lord Lovat, died without issue in his father's lifetime on the 20th of November, 1689.

After some litigation before the Scotch Courts as to the construction of a deed of entail in 1884 (1), between the present Lord Lovat and the claimant with a view of preserving evidence, John Fraser obtained a commission from the Court of Session to take depositions of some aged and infirm persons both in Anglesey and Inverness, for the purpose of shewing the claimant's pedigree from Alexander of Beaufort.

The Committee for Privileges met on the 19th of May, the 17th, 18th, 19th, 24th, and 25th of June, 1885. During the sittings the Law Peers present were Earl of Selborne, L.C., and Lords Blackburn, Watson, Bramwell, and FitzGerald.

Sir *Hardinge Giffard*, Q.C. (2), *Charles Russell*, Q.C., *Morgan Lloyd*, Q.C., *Edward Rolland*, *Robert Campbell*, *Vennell*, *W. E. Gray*, and *Gregson*, were of counsel for the claimant.

Sir *F. Herschell*, S.G., and *The Solicitor-General for Scotland* (*Asher*, Q.C.) appeared for Lord Lovat.

Sir *Henry James*, A.G., *The Lord Advocate* (*Balfour*, Q.C.) and *Crawford*, appeared on behalf of the Crown.

Permission was given that the evidence taken under the two commissions should be used subject to the condition that counsel for the opposing petitioner might object to any evidence given upon those commissions as inadmissible, whether that objection was taken by those who were then conducting the examination or cross-examination or not.

June 17, 1885. *Charles Russell*, Q.C., opened the case for the claimant. The facts relied on will be found in the judgments.

In commenting on the case of the opposing petitioner the leading counsel read the statement "that soon after the death of Hugh,

(1) 11 Court Sess. Cas. 4th Series, 1119.

(2) Sir Hardinge Giffard, owing to the change of Government, did not again appear in the case.

H. L. (Sc.) 1885 THE LOVAT PEERAGE.

eleventh Lord Lovat, his eldest daughter, Amelia, married Alexander Mackenzie of Fraserdale, and assumed the dignity and styled herself Baroness Lovat, on the pretext that the peerage was descendible to heirs female. On her death, her eldest son, Hugh Mackenzie, of Fraserdale, on the same pretext, also assumed the dignity and styled himself Lord Lovat; but ultimately, in the year 1730, after a protracted litigation between him and Simon, twelfth Lord Lovat, eldest surviving son of Thomas Fraser of Beaufort, the Court of Session declared that the dignity was descendible to heirs male, and accordingly belonged to the said Simon, twelfth Lord Lovat."

EARL OF SELBORNE, L.C. :—My first impression is that there had been a compromise in the litigation as to the estates, and that anything which passed in the Court of Session had not the authority of a judicial decision upon that matter. It might be interesting if they exercised an adverse jurisdiction in the question of peerage. [His Lordship having referred to the decreet printed on page 57 of the minutes of evidence in the proceedings of 1827 et seq., continued :—] It is an action of reduction. It is not an action to establish a right to a peerage, but an action to reduce a pretended decreet alleged to have been obtained at an earlier period (2nd of December, 1702) before the Act of Union. The decreet was sought to be reduced, and it may well be that the Court of Session had authority to reduce a decreet of their own which they thought ought never to have been made on whatever ground.

LORD WATSON :—It is alleged the decreet under reduction was given in absence, without any citation or summons, and so forth. Now, whilst the Court of Session might not have jurisdiction to entertain peerage claims after the Union of 1707, it does not necessarily follow that they had no longer the power to set aside a decreet of their own which they had previously granted, if it was granted without proper jurisdiction being constituted.

Counsel then read the fact of a patent being granted in 1837, creating the father of the present Lord Lovat a peer of the United Kingdom.

[EARL OF SELBORNE, L.C.:—Your success in this case would necessarily involve the consequence that Lord Lovat would no longer be a Scotch peer.]

The authorities generally amount to this, that if a title has been established to the satisfaction of the Committee for Privileges, upon which the Crown has acted by directing a writ summoning the supposed peer to Parliament, and if consequently it is shewn that some one else is entitled in fact to the peerage that was so dealt with, the operation of the subsequent decision is to treat the original writ as the creation of a new peerage, and not necessarily to displace the first.

[EARL OF SELBORNE, L.C.:—That could not be so as to Scotland. You are thinking of the *Willoughby of Parham Case* (1); that may or may not be the theory as to such cases, but in Scotland the Crown has no power to create a new peerage after the Act of Union. Of course here Lord Lovat would still remain a peer of the United Kingdom.]

June 18, 1885. *Rolland*, for the claimant, tendered the report of the evidence taken before two of the judges of the Court of Session on the Lovat peerage claim dated the 5th of May, 1826. They being empowered by an order of this House to examine certain witnesses in Scotland, and take their answers to certain questions, and which report was printed by order of the House on the 12th of April, 1827.

[EARL OF SELBORNE, L.C.:—Evidence formerly taken upon a claim to the same peerage can be referred to, but the interrogatories and the report containing the answers are taken as put in subject to any particular exceptions which may be taken to matters stated by the deponents.]

Rolland tendered the answer to question 8, in which Alexander Fraser of Dalnamine, gamekeeper to General Simon Fraser of Lovat, deposed that he had learnt from his own father and the neighbourhood that Alexander Fraser had killed a fiddler for playing the Highland air of "Ha Pittag er MacThomas," which Alexander conceived to be in derision of him.

(1) See Cruise on Dignities, 169.

H. L. (Sc.) 1885

THE LOVAT PEERAGE.

Sir *F. Herschell*, S.G., objected to this answer as being clearly not evidence.

EARL OF SELBORNE, L.C.:—It must be rejected, on the ground that the deponent states that the source of his information upon that subject was not from members of the family, but was "his own father" (he not being stated to be a member of the family) "and the neighbours"—it does not appear that they were members of the family. That being so, the facts not being shewn to be within the personal knowledge of the persons stating them are not evidence according to the law either of Scotland or of England.

LORD WATSON:—The point before us was raised and decided here in the *Shandwick Succession Case, Macpherson et al.* v. *Reid's Trustees* (1).

(1) In that case the question was one of propinquity. A Mrs. Ross died in 1872 vested in the lands of Shandwick as heir under the entail of William Ross of Shandwick. Certain evidence was rejected in the course of a trial before the Lord President and a jury, and the question was whether that evidence ought not to have been receivable. The jury found, the 27th of July, 1876, in favour of J. Ross Duncan and the trustees of A. G. Reid, the respondents in the appeal. The evidence rejected, inter alia, was that of Alexander Mackenzie, aged eighty-five, which was taken on adjusted interrogatories, and which was tendered on behalf of Mrs. Macpherson and A. R. Robertson, the appellants, and who claimed as heir portioners of the entailer; alleging that the great-grandfather of Mrs. Macpherson and of Robertson's mother was an uncle of the entailer. Alexander Mackenzie's evidence, inter alia, was to the effect that George Ross, the paternal grandfather of George Ross of Lochee, and who was said to have gone to Sweden, was a member of the Shandwick family; and that the wife of George Ross of Lochee was Merran or Margaret Manson, who died after he had gone to Sweden, and was buried in the Shandwick burying-place.

LORD DEAS, in confirming the rejection of the evidence, said (4 Court Sess. Cas. 4th Series, 135): It was contended at the trial that there were two George Rosses, and a good deal came to turn on whether the claimants were descended from the one, or the other. If they were descended from George Ross, the member of the Shandwick family, that was a material point for them: but if they were descended from a George Ross who was not a member of the Shandwick family, then, of course, this step in their descent was of no value to them. Now the date when the George Ross, the paternal grandfather of George Ross of Lochee, is said to have gone to Sweden, does not, I think, very distinctly appear, but it is plainly a very old story and it is not pretended that the witness Mackenzie could know anything about it except what he heard from or through parties long since dead. So likewise with regard to the question whether Merran or Margaret Manson was buried in the Shandwick burying-ground; that also

Rolland next read a passage (answer to question 4) from the deposition of Lieutenant William Chisholm, born in 1724, that

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was a very old story. I cannot discover exactly the date, which is attributable to it, but it is obviously an old story, of which the witness Mackenzie could know nothing except from what came to him through people long dead. Now, there can be no question that according to the law of Scotland, the testimony of a living witness as to what he heard from a dead witness is, in certain circumstances, admissible. So far as we know the law of England upon that subject it is not the same as ours; and it is not safe, therefore, to reason from one to the other; which of the two is the best law it is unnecessary to inquire, because there can be no doubt at all that the law of Scotland is as I have stated it. One thing, however, is essential, particularly in a question of pedigree such as we have here, that the dead witness from whom the information is said to have been derived should appear to have had some special means of knowledge of the thing or things to which he is said to have spoken. I do not say that this special means of knowledge must consist in being a member of the particular family whose genealogy is in question. If he was a member of that family, that would be very important in the question of the admissibility of his evidence. But it is quite conceivable that he might have very special means of knowledge, although not a member of that particular family. But, as regards the tradition spoken of by this witness Mackenzie, it does not appear that the dead people from whom they are said to have been derived had any special means of knowledge at all. Coupling this with the great antiquity of the things which are said to have so come down—the vagueness as to the time when this witness is said to have come to their knowledge—and particularly the manner in which he says he came to hear of them (see note, post, p. 770); it appears to me that his evidence, so far as rejected, was rightly held not admissible.

LORD MURE agreed.

THE LORD PRESIDENT (Inglis):—There is no doubt in a question of pedigree, family tradition, if it have a relative bearing on the question at issue, is admissible in evidence. But on the other hand, it is equally clear that the gossip of the locality in which the family is planted is quite inadmissible; and it appears to me that every question like that now before us must be tested by the consideration whether the information which is sought to be given in evidence belongs to the one class or the other. Family tradition is not only admissible in evidence, but if it is a well-established and constant family tradition, it may be very important and valuable evidence. But, then, to make a family tradition, you must have the fact intended to be proved—as, for example, the relation of father and son between two persons—shewn to have been matter of belief within the family, and handed down from one generation to another. The difference in this respect between the law of Scotland and the law of England I take to be, that such family tradition can be proved in the law of England only by the direct testimony of members of the family. By direct testimony I do not mean the testimony of the witness in the box, but the statement of deceased members of the family, made seriously and de-

H. L. (Sc.) 1885

THE LOVAT PEERAGE.

he had "learned from Alexander, the second son of Lord Lovat, and also from Archibald Campbell Fraser, the last Lovat, that

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liberately to the person who is put in the box: whereas, according to the law of Scotland, we admit such statements repeated at second hand, if they have been made by persons who, though not members of the family, have special means of knowledge. It is quite possible that, though in the general case members of the family will have the best means of knowledge, there may be members of the family who, from accidental circumstances, know very little about the family pedigree and lineage; whereas, on the other hand, there may be confidential servants who have been a long time in the family, or very intimate friends, who have much more peculiar means of knowledge and of hearing the family traditions than members of the family who may be absent and out of the country or otherwise estranged. I think it is the means of knowledge, therefore, that ought to be the test of the value of any statement made by a deceased person, and repeated in the witness-box. Both laws equally exclude, I apprehend, anything like common gossip; that is to say, told between persons who have no special means of knowledge whatever.

The judgment in the House of Lords, July 3, 1877, was as follows:—

LORD CAIRNS, L.C.:—

There is no doubt that in receiving this evidence of statements made by persons deceased the law of Scotland admits of a latitude which is not known to the law of England, but we have here an unanimous judgment of the Court of Session in Scotland, who, dealing with the well-established principle of their own law, have held the evidence, which in this case was rejected, and which is the substance of the exception, to have been inadmissible.

I cannot better describe the way in which that evidence presents itself to my own mind than by taking the words of the Lord President. He refers to evidence covered by the exception, and he says, speaking of the deponent, Mackenzie, "This is his means of knowledge." Then he repeats the words: "'I knew this by all the neighbours. There was no word about it till William Ross of Shandwick was killed, and there was a great talk about who was the heir to Shandwick. I heard this from many, particularly from John Polson the elder, Hill of Fearn. He died about eleven years ago, and was then, I believe, about eighty-nine years of age. Also from John Vass, Balintore, who was at William Ross of Shandwick's funeral.' Then there is interposed a passage with regard to what happened at the funeral; and as John Vass, from whom the information was derived, was at the funeral himself, and communicated what took place there to the deponent, I admitted that part of the evidence. But after that he goes on further: 'I have also heard these things from William Ross, farmer, Hill of Fearn, who himself was well acquainted with George Ross, Tarrel. He is also dead, a long time ago. Also from Donald Munro, Loans of Tullich, who is also dead a long time ago; and Alexander Hendry, Tullich, who died a long time since—I am sure fifty years since. All these died old men. It was the common talk of the country. These men I have named above I remember myself to have heard speak of these matters. They would often

Alexander, their uncle, the son of Thomas of Beaufort, had killed a fiddler for playing the Gaelic air of 'Ha Pittag er MacThomas.'"

come to my father's on a winter's evening when I was a boy from ten to thirteen, and they would always have some story to speak about; and I, as young boys are, was very ready to take it up.'" Then the Lord President continues: "Now I can hardly conceive a more graphic description of mere gossip than what is contained in that part of the deposition, and it was upon that ground, and because it was not shewn, or even alleged, that any one of the persons from whom the witness's information was derived had any peculiar means of knowledge, that it appeared to me that the evidence was inadmissible. There was one person from whom the witness received information, William Ross, farmer, Hill of Fearn, who was represented to have special means of knowledge, for he was well acquainted with George Ross of Tarrel. Now, in the first place, it appears to me that the statement that William Ross was well acquainted with George Ross of Tarrel depends entirely on the testimony of the deponent, Alexander Mackenzie, himself, who could not know the fact. But even if the meaning of this statement is that William Ross, Hill of Fearn, told the deponent that he was well acquainted with George Ross of Tarrel, I should not think that that improved the matter in the least, because I think it requires to be established in some other way than by a mere loose statement of the party from whom the witness's information is derived that he had some means of knowledge; it requires something more than that to shew that the informant of the witness was a person possessed of special knowledge: and after all, what special knowledge arose from the fact that he was acquainted—well acquainted, as it is expressed—with George Ross? What the nature of that acquaintance was we are not told. It was, apparently, a mere acquaintance—no relationship, no special bond of friendship between them—nothing at all indicating that this George Ross had any reason to place confidence in William Ross of Hill of Fearn." That really appears to me to be the gist of the case. The whole of the foundation for receiving the evidence is the statement made by William Ross of Fearn. The means of knowledge of William Ross have to be considered. It is said that he was an acquaintance of Ross of Tarrel. I agree with the Lord President that, so far as the evidence goes, we have no right to assume that Ross had himself said that he was an acquaintance. I read it rather as a statement of Mackenzie, the deponent. But assuming that Ross, the dead man, did say that he was an acquaintance of Ross of Tarrel, I cannot conceive that because a person is an acquaintance of another he is therefore to be entitled to have his evidence received as if everything connected with the history of that other person was within the knowledge of him, the acquaintance.

That is the whole of this case, and I must say that I think the decision of the Court of Session against the bill of exceptions was entirely right, and I move that the appeal be dismissed with costs.

LORD HATHERLEY:—

I entirely concur in the observations which have been made by my noble and learned friend, and with the view taken by the Lord President of this case.

H. L. (Sc.) 1885

THE LOVAT PEERAGE.

Sir *F. Herschell*, S.G.:—As far as regards the relationship and the pedigree, the marriages, and so on, in the family, and

I confess that it appears to me that the more you sift the evidence and the longer you ponder upon it, the more you become satisfied that it simply comes to this: the witness, Mackenzie, now eighty-five years of age, heard when he was a boy a great deal of conversation going on about a most remarkable and most melancholy event which had taken place shortly before the time when he, as a boy, heard people talking about it, I should say, some few years before. It is said that the event itself took place some few years before the boy's birth, and it would be naturally very much talked about in the neighbourhood, and therefore there would be no difficulty in his mentioning that he heard several people talk about it; but he has not stated that these persons who so talked about it had any special grounds of information whatever.

LORD O'HAGAN:—

I am entirely of the same opinion. The question in this case arises upon the special law of Scotland. We have the unanimous opinion of the judges in Scotland, who are the best competent, I think, to form an opinion with regard to their law, and, so far as I can judge of their reasons, they are quite irreproachable.

Suppose we admit that there is no controversy about it, that hearsay evidence is in some cases admissible by the law of Scotland as it is by the law of England, still it must be hearsay evidence under certain circumstances; it must be, as Lord Chelmsford said, hearsay of a person who had the means of knowledge, or professed to have the means of knowledge.

But the hearsay evidence here is of the statements of persons who confessedly had not the means of knowledge at all, or as to whom it is not shewn that they had the means of knowledge. It is admitted by the Lord Advocate that the witness Mackenzie speaks of a number of things which, as they occurred before his birth, he cannot speak of with any authority at all. The second and only other witness whose evidence has been in controversy, is a person who does not state, and of whom it is not stated, that he knew anything of the persons or the things as to which he deposes in the only material part of his deposition; and as it occurred to me in the course of the case, if his evidence were admissible, really you would make hearsay evidence admissible with regard to persons whose statements, if they were alive, would not be admissible at all. If this person were alive, and merely said that he knew the particular person mentioned in the deposition, it could not be allowed for a moment that he should go on and make a number of statements as to other persons and things which were not brought to his knowledge by means of his acquaintance with the particular person whom he said he knew.

LORDS SELBORNE and BLACKBURN concurred.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Cases cited in the printed papers were:—*Jones* v. *Waller*, 1753; 3 Gwillim, 847; *Milne* v. *Samson*, 26th Dec. 1843; 16 Court Sess. Cas. 2nd Series, 355; *Earl of Fife* v. *Earl of Fife's*

generally speaking the family history in that sense, the statement of this witness would be evidence, whether the persons who made that statement were persons who were themselves cognisant of the facts or not otherwise than by tradition in the family; but when it comes to a statement of such a fact as that a member of the family killed a fiddler, unless those persons were themselves cognisant of the fact, and knew it of their own knowledge, it would not be evidence of the fact.

[EARL OF SELBORNE, L.C.:—It would be difficult to exclude a family tradition of this kind as tending to assist in the identity of a person; and at the same time to admit, for example, a tradition that a man went into the army, or that he went to Jamaica, or anything of that sort. All these are parts of the history of the individual.]

There is no objection to it as proving a tradition, but it is not evidence to prove the fact that Alexander had killed a fiddler, unless it be shewn that such a fact was or could have been within the knowledge of the persons who are alleged to have made the statement.

Morgan Lloyd, Q.C., and *Campbell*, proposed to put in the evidence for two purposes, one purpose was to identify this particular individual with the individual who they said was the ancestor of the claimant, and also as the best evidence that could be obtained of the fact. Otherwise a fact, which had occurred a couple of centuries ago, was absolutely incapable of proof, unless evidence of that sort was admitted.

[LORD BLACKBURN:—Supposing there was the tradition, I do not see how it is any evidence of the fact that there was manslaughter committed.

EARL OF SELBORNE, L.C.:—If he had been known to the family

Trustees, Oct. 31, 1816; 1 Murray's Jury Ct. Rep. at p. 95; *Miller* v. *Moffat*, May 11, 1820; 2 Murray's Jury Ct. Rep. 318–323; *Alexander* v. *Offs. State*, March 30, 1868; Law Rep. 1 H. L., Sc. 276; 6 Court Sess. Cas. 3rd Series (H. L.) 54; Dickson on Evidence, sect. 102. As to the English rule, see Erskine, L.C., in *Vowles* v. *Young*, 13 Ves., p. 147; *Johnson* v. *Lawson*, 2 Bing. 86; *Monkton* v. *Attorney-General*, 2 Russ. & M. 147; *Berkeley Peerage Case*, 4 Camp. 401, 415.

H. L. (Sc.) 1885. THE LOVAT PEERAGE.

as "Thomas the thief," that would be no proof, primâ facie even, that he had been guilty of the offence of stealing.

LORD WATSON:—There is no authority in the law of Scotland for letting in family tradition as evidence of a fact of this kind. If you were to prove the fact separately, it might lead to an inference that this was the person who committed the act, but you must prove the commission of the act by some other evidence. The general rule is that whilst hearsay is admissible (that is to say, the statement at second-hand of a dead witness who could have directly deposed to the fact if he had been alive), yet hearsay of hearsay is not admissible except when combined with the rule as to repute or some similar rule.]

Dickson (1) treats the question as still open whether hearsay of hearsay is admissible when both the narrator and the party who originally heard his statement are dead.

[LORD WATSON:—When you are dealing with proper repute, it is not necessary that the repute should be traced to a person who had personal cognisance; when you have not the repute you must connect your evidence with the statement of some person who had personal knowledge.]

The chain may be more complicated than that of the statement being actually made by a person who was personally cognisant, if he speaks distinctly to another specific person who knew the fact. Dickson mentions the case of *Smith* v. *Bank of Scotland* (2). There Lord Alloway was of opinion that hearsay upon hearsay is admissible.

[EARL OF SELBORNE, L.C.:—In some cases the ordinary rule may be worked out to that result. For instance, A. (deceased) told a living witness that B. (deceased) had told him something: A. (deceased) is a good witness to the fact that B. (deceased) told him what he did, and B. (deceased) is a good witness to a fact which was within his own knowledge and which he stated. One follows that without expressing an opinion about it; but it does not at all follow that the question even arises when you have not got that condition of the evidence.

LORD WATSON:—There is not the slightest indication of the

(1) Dickson's Law of Evidence, sect. 109.
(2) 5 Court Sess. Cas. 1st Series, 98 (2nd Ed. 90).

source from which this evidence comes. It is not stated from whom Alexander Fraser or his brother Archibald Campbell Fraser derived the information.

LORD BLACKBURN:—They could not possibly have known of their own knowledge, as they were born long after the supposed manslaughter.

EARL OF SELBORNE, L.C.:—The evidence ought to have been this, that he had heard from Alexander and from Archibald that John or Thomas, or whatever his name might be, told them, that he had seen Alexander kill the fiddler. That would raise the question.]

The Lord Advocate (*Balfour*, Q.C.):—It might be a question whether, under any circumstances, hearsay of hearsay would be admissible, that is where A. stated that he heard from B. that he had been told by C. that he had seen an occurrence; that might be a difficult question. But here it is not traced to any one who asserts that he saw the occurrence, and therefore, so far as this evidence is directed to prove a substantive of the manslaughter, it is inadmissible. Then if it were directed merely to identification as a matter of repute it might come in.

EARL OF SELBORNE, L.C.:—

The evidence will be received merely as a family tradition, a story adhering to that Alexander, but not as any evidence of the fact that a fiddler was ever killed by him or by anybody else.

Morgan Lloyd, Q.C., read from the evidence which was taken on commission at Inverness on the 15th of September and at Beauly on the 16th of September, 1884, wherein Jane Mackwell Marshall, who was born three years before the death of Archibald Fraser in 1815, deposed as follows:—"(*Q.*) Did the Honourable Archibald Fraser ever speak to your father about one of the heirs that fled the country?—(*A.*) Yes. (*Q.*) What did he say?—(*A.*) He said that one of the heirs had committed a fault for which he fled the country and went to Wales, and was in a mine there. (*Q.*) Your father told you that?—(*A.*) Yes."

He contended that though it might not be evidence of a crime

H. L. (Sc.) 1885 THE LOVAT PEERAGE.

being committed, yet it was evidence of identification. There was evidence in the deposition that the deponent's father was on terms of intimacy with Archibald Fraser, who, as one of the family of Lovat, was in a position to make a declaration, which statement, if he had been here himself, would have been evidence.

Sir *F. Herschell*, S.G., contended this was not evidence of a fact, nor was it evidence tending to identify any member of the family at all.

The Lord Advocate (*Balfour*, Q.C.) :—The ruling already given would clearly exclude this evidence as directed to prove the substantive fact of the slaughter and the flight; but when it is attempted to be brought in for the other purpose, the ingredients of identification, either by the person or by time or circumstances, seem to be wanting.

LORD BLACKBURN :—

I do not think that this evidence is admissible. I do not wish to decide anything more than is necessary, and therefore I say nothing about this being a step removed from Archibald Fraser. This is a woman who says that her father, who is dead, told her that the Honourable Archibald Fraser had told him something. I do not wish to say anything about that at all. But supposing it to be evidence (a point which it is not necessary to consider) that the deceased Archibald Fraser, then in possession of the Lovat estates, did say all that is said here, I think it would be quite inadmissible, because it would not tend to prove anything of the sort that is stated. He is stated to have said that one of the heirs had committed a fault, a crime, for which he fled his country, and that he went to Wales and worked in a mine there; and he added that when his (that is Archibald Fraser's) bones were as dry that they might be turned into whistles, the heirs of this man who left the country might come back as claimants. He certainly does not state there anything to point to that heir, his uncle, being the person who would come in before him. If he had meant to say that it was a family tradition that

Alexander Fraser, the elder brother of Simon, and the uncle of the deceased man who is speaking, had fled to Wales and committed a fault and killed a man, he would have said that that man would have come in before him, Archibald Fraser; but this statement is merely that heirs would probably turn up hereafter, and I think that this is clearly not admissible evidence.

LORD WATSON:—

I am of the same opinion. It is quite obvious that Archibald Fraser was speaking of facts that were not within his own knowledge. The statement which it is proposed to put in is, in no sense, evidence of pedigree, and, therefore, receivable from Archibald Campbell Fraser, as a member of the family. I should be very sorry to hold that every floating tradition in a family, about some member of it, separately made, was good evidence. But on the other hand, where a deceased member of the family deliberately made a statement as to the connection of a particular individual with the family, or his place in the family, and accompanied that with the statement of some circumstance which tended to identify that individual, I do not think it would be possible to exclude it altogether.

LORD BRAMWELL agreed.

The evidence was rejected.

Morgan Lloyd, Q.C., read the following passage from Donald McLean's evidence:—

"(*Q.*) Did Colonel Archibald Fraser, after his last son died, say anything to Hugh MacLean, or in Hugh MacLean's presence, about his heir?—(*A.*) Yes, and those who were along with Hugh MacLean heard it as well as Hugh MacLean himself. (*Q.*) What did he say?—(*A.*) Colonel Archibald Fraser gave a loud, bitter cry. He cried very loudly three times, and said, 'Where are you, children of Alexander? come on now, lift up your heads, there is nothing whatever now in the way.' Colonel Archibald Fraser got two or three letters at the time; a message having come with two or three letters to him. (*Q.*) Did one of those letters contain the information of the death of his last surviving

H. L. (Sc.) 1885 THE LOVAT PEERAGE.

son?—(*A.*) He told him that the letter announced the death of his last surviving son. (*Q.*) Did Hugh MacLean tell you this? —(*A.*) Yes, Hugh MacLean told me this."

He proposed to use this statement as evidence that, according to the belief of Archibald Fraser at all events, Alexander had left issue, and that that belief might fairly be supposed to be in consequence of a tradition in the family, and that they were heirs to that extent. It identified them in that way.

Sir *F. Herschell*, S.G., objected, first, because there was no foundation laid for admitting anything that Hugh MacLean said. It was a statement made by the witnesses as to what Hugh MacLean had said that Archibald Fraser had said to him. Also the Lord Lovat from whom the Strichens claimed, and to whom they would have to go back on the decease of this gentleman without issue, was an Alexander, and therefore the Strichens would be the children of Alexander.

The Lord Advocate submitted that if it was tendered as evidence of the fact that any Alexander had children, it would not sustain that contention, though it might be admitted as a matter of family repute.

LORD BLACKBURN:—

I think that this particular piece of evidence, that Colonel Archibald Fraser gave this cry, may be capable of being construed in such a way as to make it a statement of pedigree, or it may be construed in such a way as not to make it a statement of pedigree. I think it will probably be better to receive for the moment this as an adminicle of evidence, and when we have other evidence that is brought, to consider both what it amounts to, and what weight should be given to it, but not at present to reject it.

LORD WATSON:—

I am of the same opinion. I do not think we ought at present to decide what is the true construction of that ejaculatory statement. It may be that further light may be thrown upon it in the

course of the proof. In its present aspect I think it is capable of a construction which might favour the Petitioner; it is also to my mind capable of a construction which might very much favour his opponent.

LORD BRAMWELL concurred.

Morgan Lloyd, Q.C., tendered the evidence of Alexander Fraser, in which he said the "late Abertarff spoke to me about the Bodach Beag and his people. He said to me that the Bodach Beag was one of the family."

The evidence was rejected on the ground that the late Abertarff (Mr. Archibald Fraser), was an illegitimate grandson of Simon, Lord Lovat, and therefore not a member of the family, but a stranger in blood, and also that he died after the lis had begun.

Morgan Lloyd, Q.C., referred to the evidence taken on commission in Wales. He read some of the evidence of Hannah Pritchard or Evans, aged ninety-three in 1884. The material part of this evidence was that she remembered John Fraser going to Scotland, and the following: "(*Q.*) Did John Fraser tell you something about Lady Lovat shewing pictures?—(*A.*) Yes; she shewed him a picture, and he said, 'This is not the portrait of my father;' and when she shewed him another he said, 'This is the portrait of my father.' Lady Lovat said that she was sure he was Lord Lovat, and made him undress and shew a mark on his shoulder. I do not know what the mark on the back of his shoulder was, whether it was a wart or a black mark. Lady Lovat said nothing but that he was one of the family; that he had the same mark as the other members of the family. Lady Lovat said something about her husband having a mark like that."

Sir *F. Herschell*, S.G., objected. One of his grounds of objection was that for the reception of hearsay evidence the statement must be made ante litem motam.

Morgan Lloyd, Q.C.:—What is tendered in evidence is the substance of this evidence, that John Fraser relates the circumstances

H. L. (Sc.) 1885 THE LOVAT PEERAGE.

which if he had been living he would have been a competent witness to relate, namely, the circumstances of his going to Scotland and of his seeing these pictures, and having an interview with Lady Lovat.

[EARL OF SELBORNE, L.C.:—I should like this question considered, namely, whether it is not quite clear that the visit to Scotland was with a view to prosecuting a claim which could not be regarded otherwise than as contested, litigious in that sense; and does not that make all the statements open to the objection that they were not made independently of a particular purpose.

LORD WATSON:—I do not think that, according to the law of Scotland, the mere fact of a lis arising will necessarily exclude every statement which is of a trustworthy character; but where it is made by a person prosecuting or promoting a lis, the statement is not evidence, whether it be written or oral. We decided in the *Dysart Case* (1), that a written statement given to the parties employed in getting up the lis, namely, a statement of what the writer would be prepared to say as a witness, was not admissible. If that is not receivable I do not see how oral statements made by persons in the same position can be less objectionable.

EARL OF SELBORNE L.C.:—It is very important to adhere to whatever is the right principle on that subject, because nothing would be more dangerous than, where a person is engaged in endeavouring to get up a case in support of a claim which he thinks he is entitled to make to estates or to titles, to accept evidence created in this way. If these statements are made by competent persons, whose evidence would be otherwise receivable, quite apart from any purpose of that kind, no doubt they would have weight, or might have some weight, but when you get them upon the hearsay of the man who is getting up the case, who went to Scotland expressly for the purpose of seeing what he could find there in support of his case, and when this is his report of what he did find and what did happen, it strikes me that it is dangerous to receive it.

LORD WATSON:—It is impossible, in my view, to distinguish this from the point which we ruled in the *Dysart Case* (1). The

(1) 6 App. Cas. 489; and see *Berkeley Peerage Case*, 4 Camp. 415.

only distinction between the two cases is, that one is a statement furnished in writing and the other is an oral statement.]

It is admitted that he went there for the purpose of advancing his claim to the titles, or to the estates, at all events; but then he comes back; he takes no steps there, except that he simply goes there to make inquiries. There was no proposal then as to litigation; but even if there were any, this particular statement is not a statement made with a view of prosecuting his claim at all.

[LORD WATSON:—He restates in Wales what had been stated to him in Scotland at the time when he was prosecuting his case there. Supposing that when he was in Scotland, instead of trusting to his recollection of what Lady Lovat had said, he had asked her to write down all that she believed concerning him, and that she had done so, and that he had taken that back to Wales and shewn it, that would not have made it evidence.]

Supposing that John Fraser had been alive and had been here as a witness, he would have had a perfect right, quite irrespective of the question of lis mota, like any other petitioner or plaintiff, to come forward and give evidence of facts which had taken place.

EARL OF SELBORNE, L.C.:—It raises a question of principle.

The Lord Advocate:—

In so far as this evidence is directed to set out what John Fraser says took place in a conversation with the lady (Lady Lovat, as she was then called), it falls within the ruling in the *Lauderdale Case* (1). The ground upon which that principle was founded seems to be this, that while hearsay evidence is generally admissible in the law of Scotland, there are exceptions where the evidence is given under circumstances which would render it unsafe to admit it. That was the general principle, and to which effect had previously been given in Scotland; and the cases of precognitions taken in a lis and in a matter of dispute were treated as illustrations of that principle—they were not exhaustive, but were prominent illustrations of it. This evidence imports that John Fraser went to the North for the purpose of pushing his claim, or at all events

(1) See ante, p. 707.

H. L. (Sc.) 1885 — THE LOVAT PEERAGE.

for the purpose of obtaining evidence which, if adequate, he would set up in support of his claim, and he here relates the conversation which he says took place with Lady Lovat. Now the test has been given whether, if John Fraser had been alive he would have been a competent witness to speak to what took place so as to eliminate the element of hearsay from it. Now it is only a verbal precognition. If he had recorded in writing the statement of Lady Lovat, or if instead of John Fraser going himself he had sent his solicitor, and Lady Lovat had said to his solicitor the things which she is stated to have said to John Fraser himself, and if the solicitor had put them down in writing, it would have been simply a precognition of Lady Lovat with a view to the case. There seems to be no difference in principle when instead of either a solicitor going to Scotland and reducing the statement to writing, or John Fraser himself going to Scotland and reducing the statement in writing, John Fraser recites verbally what evidence he had obtained in support of his claim. That is what it seems to amount to. For instance, here is the statement: "Lady Lovat said that she was sure he was Lord Lovat, and made him undress and shew a mark on his shoulder." That is simply a statement that Lady Lovat had given her opinion that he was the right man. Then as to the remainder, which is in the nature of facts, it seems very difficult to separate it—it is all part of the res gestæ. That might be regarded by the Petitioner as immaterial; but any materiality which it might have would be derived from the connection in which the thing occurred, and its importance as assuring Lady Lovat in her opinion that the claimant was the right man. Now, if that was an ingredient which entered into the judgment of Lady Lovat, and if the substance of the thing is in the opinion of Lady Lovat given to Mr. Fraser, when he went to get up the case in the North, it falls within the ruling in the *Lauderdale Case* (1).

EARL OF SELBORNE, L.C.:—

I cannot help thinking that this evidence ought to be rejected, and I rather think that the question is raised upon a portion of the evidence which, if admitted, would manifestly have so little

(1) See ante, p. 707.

value that by itself it could not have much influence upon the case. The authorities, which were referred to the other day in the *Lauderdale Case* (1), establish, I think, this principle, that the statements of a deceased person as to matters which were within his knowledge, and as to which he would have been a competent witness, are admissible when the circumstances under which they were made are such as to be consistent with a presumption that they were honest and true, but that when a person endeavours to get up evidence in support of his own case, either by himself or by another, that presumption does not exist. The partiality and the purpose of interest vitiate the whole matter, and under those circumstances you cannot, à priori, place reliance upon what he reports, even if it be in writing, and much less if it be oral. As to the degree of success which he met with in hearing things said to him by persons who possibly might have been witnesses, which things were in support of his case, under those circumstances, the onesidedness and the element of partiality vitiate the thing from first to last, and make it unsafe to give credit to it. For that reason, as I understand the authorities which were referred to the other day, such evidence is an exception to the general rule, and this seems to me to be a case clearly coming within that exception; because the whole motive and purpose of this man's visit to Scotland was to obtain, if he could, something in support of the claim which he conceived himself to have, and which he had already been endeavouring to get some evidence to support.

LORD BLACKBURN concurred.

LORD WATSON:—It is obvious from the depositions taken of the aged witnesses, that there must have been an erroneous impression in the minds of those who conducted the claimant's case, that, according to the law of Scotland, any statement, made at any time, and in any circumstances, by any person, becomes evidence after he is dead.

The evidence was rejected.

Campbell proposed to put in a retour of service, made in

(1) See ante, p. 707 *et seq.*

H. L. (Sc.) 1885 THE LOVAT PEERAGE.

1823 on the occasion of the accession of the first member of the Strichen branch; and from that to shew that Mr. John Anderson acted as agent in the proceedings of that service, and was actually present and heard the depositions of the witnesses, as a foundation for putting in Mr. Anderson's book (or the manuscript of it), and note on p. 127 as secondary evidence of what was contained in the judicial depositions in 1823. The purpose was to shew that the facts he narrates were within Mr. Anderson's personal knowledge, search had been made for the depositions, and they could not be found in the Sheriff's Court.

[EARL OF SELBORNE, L.C.:—If Mr. Anderson were here producing some documents which he said were a copy of these depositions, he would have to prove that the depositions had been made and had been sworn, and that this copy was taken down accurately from the mouths of the witnesses, and he would have to swear to its correctness. I take it for granted that these requisites cannot possibly be supplied by his printing something in a book which he represents as the substance or the words of those depositions. If they were even written depositions you could hardly, without proving an examination and comparison, and that the copy was correct, make secondary evidence of that copy; and when it is parol evidence, it is absurd to suppose that it can be so made evidence.]

Morgan Lloyd, Q.C., read the passage in Mr. Anderson's book: "A dispute having arisen at a funeral at Beauly, near Inverness, he," (Alexander) "killed a man and, dreading the effects of his passion, fled to Wales, where he died, without male issue." "Note. This incident is given on the testimony of Simon Fraser, natural son of Lord Lovat, and nephew to Alexander, who was examined officially before the sheriff substitute of Inverness, upon the 15th of October, 1823, on the family pedigree." If John Anderson had been alive and present here, it would have been perfectly competent for him to say: "There was verbal evidence given at the trial on behalf of Lord Lovat's ancestor, and his evidence upon such a point was so and so." And that would have been admissible evidence here.

[EARL OF SELBORNE, L.C.:—If we had Simon Fraser's evidence,

which at present we have not, we should have to sift out of it that which was probable evidence, and that which was not probable evidence for the present purpose. In my opinion it is totally impossible that he should have any personal knowledge of things so remote as those to which you are referring: and then the question would be whether he is to be treated as a member of the family, and a competent witness on that ground. I should think not, if he was the natural son of Simon, who was beheaded. Therefore his statements as hearsay would be no evidence at all, and we should have to find some other ground for regarding anything which was in that affidavit as evidence.]

Sir *F. Herschell*, S.G., stated the inquiry was on the 3rd of November, and he had the deposition of the 15th of October. The document bears upon it a certificate by this very John Anderson, W.S., that the signatures of the sheriff substitute and of the deputy clerk to the sheriff of Inverness were acknowledged in his presence.

Morgan Lloyd, Q.C.:—That is not the document I referred to.

He then asked for an adjournment to obtain such proofs as might be necessary to make the document in the handwriting of John Anderson evidence.

EARL OF SELBORNE, L.C.:—I should think you will never be able to do that; but being told by your opponent that he produces the identical document, or something purporting to be that, from the muniments of Beaufort Castle, it is clear, I think, that you never could make anything else secondary evidence, even if it were of a better sort than Mr. Anderson's book, without giving notice to Lord Lovat to produce this document if he has it; and as we know that he has it, you would then have produced a document which the Solicitor-General has in his hand, and is willing to shew you. You, no doubt, are not obliged to take advantage of that offer, but we never could receive secondary evidence until we knew that you had given notice to Lord Lovat to produce any such document.

LORD WATSON:—I have looked at the document. It bears

H. L. (Sc.) 1885

THE LOVAT PEERAGE.

the process marks, and if it is not counterfeit then the presumption is that it was produced in that process.

Lloyd, Q.C., examined a witness who produced a document which he stated to be a copy of a letter dated the 9th of December, 1758, from General Simon Fraser to Ensign John Fraser, produced in an adjudication of competing service between Lord Lovat and the Rev. A. G. Fraser, deposited in the Chancery Office, Edinburgh. He could not tell by whom it was made.

Sir *F. Herschell*, S.G., objected, as being a copy of a notarial copy, that is to say, a copy of something which purports to be a copy made by some notary, of a letter.

[LORD WATSON:—It is not established that the document was given in evidence. Parties in Scotland are in the habit of lodging documents with an inventory. They are numbered by the clerk, and referred to as numbers of process, but that does not in the least degree prove that they were tendered or admitted in the evidence.]

It is necessary that it should be shewn on whose behalf the document was tendered in that proceeding, and what was the nature of the proceeding in which it was tendered, and the purpose for which it was put in.

On a subsequent date (1) this copy of a notarial copy of a letter was rejected as inadmissible.

Richard Bulkeley, residing at Inverness, stated that in 1880 he paid a visit to Amlwch, and on looking through the churchyard he came across a tombstone containing the name "Fraser, Beaufort, Beauly, Scotland." These words were all he took notice of. The stone appeared to be very old and almost level with the ground.

They produced old mining vouchers for work done for Sir Nicholas Bayley in Wales. A voucher of date the 11th of November, 1837, bore the signature of the ancestor of the petitioner, and appeared to be Alex^{r}. "fereser" or "Freser." Old mining books were also produced in which, inter alia, under date of

(1) 24 June, 1885.

the 2nd of May, 1775, Alexander Fraser, the petitioner's ancestor, in giving a receipt signed his name "Alexander fereser." As to family tradition, the Rev. Simon Fraser, aged forty-eight, and brother of the petitioner, stated, inter alia, that he heard from his uncles that their grandfather, John Fraser, told them what his father, Alexander Fraser, told them about his family estate in Scotland; and that he was the son of Thomas Fraser of Beaufort. His uncle William told him in 1850 or 1851 that his (witness's) great-great-grandfather Alexander fled from Scotland on account of the part which he took in the rebellion; and also that when returning from a funeral he killed a fiddler at a wedding; that he fled to the sea-shore and hired a fishing-boat for thirty guineas to take him to Wales; and that the horse which he had was given as a part of the payment, or the money which he got for the horse. The tradition said he took the fishing-boat from Inverness, then that he concealed himself in the mines at Llangynog, &c. That Alexander called his children to his death-bed, telling them that he was leaving them in a strange land, but for them not to despair, that the time might come when they would be called back to enjoy their rights in Scotland; and he begged of them to retain the family names. In his further examination the witness stated that he had accidentally come across the register of the baptism of Alexander the youngest son of Alexander Fraser in 1752.

Napoleon Simon Fraser, son of William Fraser, great-grandson of Alexander Fraser, gave evidence of similar tradition.

Counsel were informed that it must not be supposed because there was no interposition, that all these statements which were evidently post litem motam, as to matters of fact as well as matters of pedigree, were admissible.

The petitioner gave somewhat similar evidence.

Sir *F. Herschell*, S.G., having opened the case for Lord Lovat, tendered, inter alia, the following evidence:—

Mr. Stewart from the Registrar-General's Office, Edinburgh, produced a bill of mortality of the parish of Wardlaw or Kirkhill and Farnwey, Inverness, from the year 1663 to 1709. It contained an entry recording the death of master Alexander Fraser,

H. L. (Sc.) 1885 THE LOVAT PEERAGE.

younger, of Beaufort, on the 20th of November, and his burial on the 3rd of December, 1689. The document had been sent to the Registrar's office by order of the Sheriff of Inverness.

Mr. John Fraser produced, inter alia, records of the Presbytery of Inverness for the years 1708 to 1723, shewing that the parish of Wardlaw was vacant from 1709 to 1717, and that Thomas Fraser of Dumballoch was one of the largest landowners.

The Rev. Charles Bruce, custodian of the records of the Synod of Moray (within which the Presbytery of Inverness is situated), produced the records from 1663, to shew all ministers were ordered to keep a register of persons dying within their parishes.

Mr. Biscoe stated his father married the youngest daughter of Mr. Fraser of Newton, and his father purchased the estate of Dumballoch on the extinction of the male line. With the estate came into his possession a lot of documents. He was searching for other papers in the Dumballoch charter chest when he came upon the bill of mortality.

Sir *F. Herschell*, S.G., submitted the bill of mortality was evidence. The source from which it came was clearly proved, and was such as to warrant its acceptance.

Morgan Lloyd, Q.C., and *Campbell* objected to the bill of mortality being received, as at least it did not come from the proper custody, which was the minister of the parish.

The document was admitted subject to its weight as evidence.

Sir *F. Herschell*, S.G., then tendered a bond executed by "Alexander ffraser," eldest lawful son of Thomas ffraser of Bewfort, dated the 24th of February, 1684, and registered the 10th of April, 1690, as shewing the signature of Alexander Fraser, the undoubted eldest son of Thomas of Beaufort, and which he contended was most unlike the signatures in the voucher of 1737 and the mining books.

Sir *F. Herschell*, S.G., also tendered extracts from records of the Court of Justiciary, Scotland, of 1698, in which Simon Fraser is described as "Captain Simeon Fraser, younger, of Beaufort";

and "Captain Simeon Fraser, eldest lawful son to Thomas Fraser, of Beaufort" shewing that at least as early as 1698 Simon was described as being then "younger of Beaufort," meaning that he was then the eldest surviving lawful son.

June 25. *Morgan Lloyd*, Q.C., summed up the case for the petitioner John Fraser.

June 25. LORD BLACKBURN :—

The real question, my Lords, in this case, and the question which should be first discussed, is whether there is sufficient evidence to shew the identity of the Alexander Fraser who was working in the mines in Wales, and from whom the present claimant claims, with the Alexander Fraser, son of Thomas of Beaufort, who unquestionably would be a person whose descendants, if he had any, would come into the pedigree and would succeed to the title before the present Lord Lovat. What the consequences would be of that being proved is another question —more proof might be required afterwards, and more questions might have to be discussed afterwards; but it is decisive of the case if the claimant is not able to shew that the Alexander, from whom he doubtless descends, namely, the Alexander working in Wales, was the same person who, in 1689, raised a body of men to assist in the rising under Lord Dundee, and whose descendants would certainly come in first. Now it has been said, if he was the same person (which is certainly not a likely thing), what evidence could be given of it? It seems a strange argument to say, that because it is alleged that there is no likelihood of any evidence of it being found you are to assume it without evidence.

But let us see what is the evidence as it stands, and I will only take those things which are, to my mind, satisfactorily proved. What is that evidence? First, as to Alexander, the son of Thomas of Beaufort, a bond has been produced, dated in 1684, by which it appears that Alexander Fraser of Beaufort, and another Mr. Fraser, as cautioner for him, became sureties for certainly a very small sum, £35 Scots, which, I think, would be nearly £2 of English money; I should not have supposed that the value of money was at that time so great in Scotland as to make that

H. L. (Sc.) 1885 THE LOVAT PEERAGE. Lord Blackburn.

bond so important as it seems to have been regarded. This document is produced to shew two things. The first of them is that Alexander must have been of full age in 1684, which is certainly very much more consistent with his being the person who afterwards, in 1689, raised a body of men to assist Lord Dundee. He would be then twenty-six years of age. I think that that is much more likely than that he was at the time so very young as the other side allege that he was. The bond was produced for that purpose, and further it was produced for the purpose of shewing that the handwriting signed there is not the same handwriting as the handwriting which is proved (more specimens than one have been proved) of the Alexander Fraser who was in Wales, and from whom the claimant is descended. Now upon that point it is very difficult indeed to account for the manner in which opinions will differ. I think this signature of Alexander Fraser to the bond is in a bold, well-written hand; it is a very marked one, and is the signature of an educated man, and, which is more to the purpose, he spells his name with two little "f's," instead of a capital F, and with one "s," and then with the letters "er"—"ffraser." When we look at the signature in 1737, the earliest produced, I can only say that it seems to me, on comparing the signatures, that it would be very difficult to have two handwritings less similar. Partly to account for this dissimilarity, it is said that in the interval which had elapsed between 1684 and 1737, a period of fifty-three years, during which, according to the claimant's view of the matter, Alexander Fraser had been working as a miner, his handwriting would alter. Perhaps it might alter if it was true that he was working as a miner, but I do not think it possible or reasonable to suppose that his mode of spelling his name would alter, and that he would spell his name differently: and it seems to me that the signatures are as little alike as could possibly be. Now, if that is satisfactorily made out, it would seem to me to be strong evidence, as much as could possibly be expected, to shew that the person who was living in Wales and signing these entries in the miner's book, was not the person who was the son of Thomas of Beaufort.

But it is said, notwithstanding all that, that there is a great probability that Alexander Fraser fled from Scotland and was

party to a conspiracy, to spread a report of his death for fear he should be prosecuted for high treason, or for the manslaughter of a fiddler, whom he is supposed to have killed; and it is said that Simon Fraser, afterwards Lord Lovat, as to whom no doubt there is a very general agreement that he was a bad character, but I think there is scarcely any ground for supposing that he was a bad character of this sort, spread the report of his death, intending to usurp the estates and to take the title. That seems to me very improbable. Still, let us see what ground of evidence there is for it. In the first place, it is very true that when on the former petition of Lord Lovat there was evidence to shew that Alexander Fraser, son of Thomas of Beaufort, had died without issue, there was no occasion to shew that at that time he was dead, because nobody would suggest for a moment that a man who was a grown-up man in 1689 was not in 1826, still more in 1854, dead long ago. That, of course, required no proof. But it was necessary to shew that there was reasonable ground for supposing that he had not been married, and that he had left no children. Upon that point the only evidence which was given directly was evidence in the family, evidence of all sorts that Alexander Fraser was never reputed to be married, and was never supposed to be married; and there was no tradition that he ever was married or ever had children. It is said "that may be all very true, but if he was the Alexander who was in Wales, we will shew that he was married and had children." When it was proved that there was no repute of Alexander having been married or having had children, that was followed up by evidence as to the headship of the clan Fraser, which would certainly be an important thing, it being a matter of pride. It was not only important as a matter of pride, but in that troublesome time, when there was war going on in the Highlands between the contending families of the Jacobites and those supporting King William and Queen Anne,—and afterwards the Hanoverian succession, it was a very valuable thing to be able to raise forces. Simon himself shewed that he made bargains for it in one way or another. Simon did assert that he was the head of the clan, and he was admitted by the clan to be the person whom they treated as the head, as the eldest surviving son of Thomas of Beaufort.

H. L. (Sc.) 1885 THE LOVAT PEERAGE. Lord Blackburn.

There was a good deal said upon this subject as to the proceedings on the part of the Crown: it was said that some six years afterwards, when proceedings were taken against Thomas of Beaufort and Simon for an outrage upon old Lady Lovat, no proceedings were taken against Alexander. When one looks at the facts, Alexander was, according to the one case, in his grave, and according to the other case he was in Wales at that time. I do not think it is astonishing that there should be no proceedings taken against him for an outrage which took place of that kind. But it is important in another respect: it shews that the Crown, those who were prosecuting Simon Fraser and Thomas of Beaufort, did think that Alexander was dead, and was dead without issue, for in the formal charge against Simon they called him "Captain Simon the younger of Beaufort," which he would be if Alexander was dead, but which he would not be if Alexander was alive. That sufficiently proved that there was no ground in their minds for supposing that he was alive, which renders it an improbability that he was in Wales or anywhere else.

Then there are a great many other inferences. In the first place, I do not know whether there is good evidence of this, but I should say that a Highland gentleman of pride, such as Alexander Fraser, the son of Thomas of Beaufort, was, if he was at all like the Highlanders are now, would think it a very great degradation to go working in a mine and to work for wages. "My father's son to do that?" is the sort of phrase a starving Highland emigrant, who comes down from the Highlands, and to whom some dirty work is offered, would use—he treats it as a great insult. It is highly improbable that Alexander Fraser, if he was in Wales. would work in a mine, still less that he would continue working in the mines there, as some of the documents shew that he did, and that he was paid for inspecting mines—it is highly improbable that he would do that from 1689 down to his death in 1776, a period of eighty-seven years. That, certainly, is very unlikely.

Then there is an inference to be drawn from the age. We know that this man who worked in mines in Wales married in 1738; that was forty-nine years after 1689, when Alexander ran away or died. If when he ran away he was twenty-five years old, forty-nine and twenty-five would make seventy-four. No doubt a man may marry

at seventy-four; it is not such an old age as to be impossible. But we are told in the traditions of the family that he ran away with a young lady, an heiress. It is not very likely that a man of that age would induce a young lady, an heiress, to run away with him, but it is possible. Further than that, it appears that his third son was baptized fifteen years afterwards. That son, therefore must have been baptized when the father was eighty-nine. I do not say that that is impossible, but there is an improbability in it. Then lastly it seems that this man Alexander continued, I will not say to work in the mine, because I think it is possible that the old man was a partner with others, and that the others did the actual strong physical work, but he used to sign the documents for the receipt of the pay down to 1776, when he died. That again is eighty-seven years after 1689, and if he was twenty-six years old at that time, it would make him 113. I am not going to say as a matter of law to what age it is possible for a man to live: I do not go further than to say that the age of 113 has never been, that I am aware of, authentically proved to have existed, and it is certainly a very improbable age. It throws a great burden upon those who assert that this man was the same man as the Alexander the son of the Thomas of Beaufort.

Now, what is there to oppose this? The first question which one asks is, What grounds are there, independently of the tradition in the Welsh family (which I will come to presently) for saying that Alexander Fraser ever did leave Scotland in 1689? I think there are absolutely none. There is enough evidence to shew that in Scotland it was said, that he was the person against whom some Gaelic air, with a name which I will not attempt to pronounce, was played, turning him into ridicule, and that some of the family had said that Alexander resented that, that a fiddler did, on one occasion, at some wedding or other, play that tune, and that Alexander killed the musician—whether a fiddler or a piper I suppose is not very material—that he killed the man who had insulted him by playing that air. There is not the slightest ground for saying that there is any evidence that such a manslaughter was ever committed. But if it was, I do not think that according to the state of the Highlands at that time a gentleman of birth and family like Alexander Fraser of Beaufort, a close

H. L. (Sc.) 1885 THE LOVAT PEERAGE. Lord Blackburn.

connection of the then Lord Lovat, would be in great danger of legal process for having done that deed. If, however, he had thought himself in danger he would have been much more likely to have taken refuge in his mother's family, where, in fact, his father afterwards, who was pursued for a much more serious and important offence, I mean the outrage upon Lady Lovat, did take refuge. But there is no proof whatever that Alexander ever killed a fiddler at all. Certainly there is no proof whatever that any proceedings were ever taken on the part of the Government by the Lord Advocate, or by anybody else, against him for which he would be at all likely to fly. That he was engaged in the battle of Killiecrankie is certain, that seems to be agreed; and there is no doubt that that was 1689. William, as we all know, got possession of the Crown in 1688, and he and Mary were unitedly made the sovereigns of England and Scotland in that year, 1689. No doubt that would be an act of treason against the then existing Government, but it was an act of treason against the then existing Government which would not be very likely to be vehemently prosecuted on the part of the Government against a young man, an inferior agent in it; and certainly if he had fled on that account one would have supposed that he would have fled not to Wales but to France, or to some place of that sort. If he did not keep himself as his father and brother did for some years, with a strong hand in the Highlands repelling those who were coming to take him, as Simon afterwards did, he would instead of flying to Wales have fled to France to join the exiled King James and his party there. That would have been the natural thing to have expected.

I have already pointed out the exceeding improbabilities of this man Alexander being the same Alexander as the other. Now let us see what the evidence comes to which attempts to shew that fact. There is proof enough, as I said before, with respect to the Alexander who died in Wales in 1776, that his son was John, from whom the family of the claimant are descended. We must see what became of the estates and the title in the meanwhile. First of all Simon did get acknowledged by the clan as their head, and by means of that he did succeed in 1715, after various fights about it, in raising a body of men in favour of

George I., an important service for which his outlawry was reversed, and he got somehow or other (I will not inquire how) de facto into possession of the Lovat estates and the Lovat title. All the time until 1747, he having that position, he was according to the claimant's account, a usurper upon Alexander, who, the claimant says, was living in Wales but who was making no sign. Is that a probable thing? Is it likely that if Alexander was the real Alexander, the elder brother, he would remain in Wales making no sign whatever during that time? It is said by way of attempt to explain it, that he had fled to Wales in order to conceal himself for fear he should be tried. It is a very strange thing that if he had such a purpose as that, he should continue to sign himself "Alexander Fraser." I could quite understand it to be a possible thing if the man worked at the mines, that he should sign his name, if he wished to sign it at all, "William Jones." He would say—"If I make it known that I am Alexander Fraser the officers of justice may be after me." That the man should take refuge in Wales to hide himself, and, as the tradition seems to say, should there shew himself in his Highland dress (I think the kilt was not invented, but it may have meant the trews) and by way of concealing himself and hiding himself, should go to the mines and sign his name "Alexander Fraser," seems to me an exceedingly improbable story.

Then, again, when Lord Lovat was tried, convicted, and attainted, the estates came to the Crown, and Alexander might have petitioned the Crown in 1747, and have said, "I am the real heir, on whom my brother usurped, give me, at least out of grace, some portion or something out of the property, if you will not restore to me the estates." He might have made some claim of that sort. But nothing of that kind seems to have been suggested. There was an application made by the sons of Simon, who had no right whatever, even if the attainder was reversed, either to the estates or to the title if this Alexander was still alive. There was an application made by them to have the estates restored, and they got them restored, and the third son came in afterwards. That third son had children, but the last of them died in 1803, and it is said that the old man, the third son of Simon (and it was one of the pieces of evidence which were

H. L. (Sc.) 1885 THE LOVAT PEERAGE. Lord Blackburn.

tendered and admitted valeat quantum), exclaimed, "Now there is nobody between me and the children of Alexander." There was an Alexander, Lord Lovat, from whom the family of the branch of Strichen descended, and I think myself that the probability is that when the old man called out that, he was alluding to the children of that Alexander, and saying that there was no one between him and them. There is also some other evidence that this last of the three Lovats the sons of Simon did before his death say that Strichen was, he believed, the heir, but that he thought and suspected that before he was twenty years in the grave there would be plenty of claimants starting; and I myself think that he was very well justified in the expectation. I should myself have expected that as soon as in 1803 it was known that the descendants of Simon, who was attainted, had died out, there would be a general expectation that there would be a great Fraser cause as to who was the heir, and I should myself think, that there would most probably be a great many claimants. Two claimants there seem to have been. But that the old gentleman said, or had any ground for saying, that at that time he declared, or had the belief, that Alexander, his uncle, who had been treated as long dead, was still alive, or had been alive quite recently, seems to me not a tenable proposition.

Then in 1803 it does appear, just as might have been expected, that John Fraser, the great-grandfather of the present claimant, did begin to stir himself to try and make out that his Welsh family were the heirs. I do not think that it appears distinctly when that began. There was a curious document produced, namely, the rate book in 1809, in which there was some entry made (it was never explained how and why) rating some property of "Lord Fraser, &c.," and certainly, if that was genuine, it would seem that he had styled himself so and had set up his claim—that in 1809 he had begun to give himself that nickname, for it was only a nickname, there is no evidence that there ever was a Lord Fraser, whatever rights he might have. But he did, sometime about 1809, style himself so, and he got the nickname "Lord Fraser" about that time; and in 1814 or 1815, when he was still styling himself in that way, he seems to have obtained from his fellow miners subscriptions of money to enable him to go to

Scotland, where he did go, in order to try to support his claim. By this time the last son of Simon, Lord Lovat, was dead—his widow was still alive—he went to the widow and presented himself as the person who made a claim, not against her but to the estate. She seems to have received him. She was not a member of the family, and knew nothing about what had taken place before, but she did receive him. From that time when he came home it is clear that if the English rule of evidence is the rule to be applied, that all the statements proposed to be put in as being statements of the family, would be inadmissible altogether, because they were post litem motam. In English law it seems quite clear that you may receive the evidence of tradition in the family from any of the family, provided the statement was made before a controversy had arisen, that is to say, ante litem motam. There is some difficulty in saying when the lis began, but it is perfectly plain that if these statements were all subsequent to 1815 or 1816, when this man had actually gone for the purpose of raising a suit, although, for some reason or other, he did not raise a suit, they would not be admissible at all. As I understand the Scotch law it is by no means clear that the rule as to pedigree is settled precisely in the same way as it is in England and that the doctrine of post litem motam would be conclusive as to whether the tradition was admissible or not. But I think there can be no doubt at all that, supposing it to be admissible in Scotch law, it would have very little weight, it being post litem motam.

Now all the traditions of which we have evidence here (I will not trouble your Lordship by reading them) are varied traditions, but they ultimately come to this: These persons were discussing the matter amongst themselves as to how they should get the estates, which they, no doubt bonâ fide, believed they were entitled to, and it all comes round to this: "Our ancestor whilst he was alive did say something about his being entitled which has led us to believe that he was entitled." In 1845 or 1850, when the decision had been given in favour of Lord Lovat, they were very aggrieved at it, and the family meeting together they then talked of and discussed it. At that time, old John was dead, and the next heir was dead, there were two or three generations dead. They discussed what had been the

H. L. (Sc.) 1885 THE LOVAT PEERAGE. Lord Blackburn.

tradition in the family in order that they might settle what they would do, and to urge upon the eldest son, who it appears had made some money as a contractor, that having made the money he should institute proceedings to get the Lovat estate for the good of the family, and each one of them seems to have told a different story at that time. It all comes round to this—they say that Alexander, who worked in the mine, said that he was the Alexander who had fled from Scotland to Wales. Each of them seems to have felt the objection which there was of the extreme improbability in the case, which I have pointed out, and that it was desirable that the statement should have accounted for it. I do not suspect that there was any intentional falsehood in that respect. I think that each one had the thought (for instance, one of the persons now deceased) Why should he come to Wales? he said he told us that he had fled there to take refuge with Lord Powis—he was his fellow student. When the people connected with King's College, Aberdeen, were called for the purpose of proving the age of Alexander I thought it worth while to ask, "Is there any evidence in your records that the Earl of Powis, or any of the Herberts, were ever in that college?" Somewhat to my surprise I found that the records had been searched and that the witness was able to say that there was no evidence there to shew that they had been fellow students.

The members of the family do not all agree upon this matter. Another version is: "He fled to Wales, because Lord Powis was a Jacobite." I have no doubt that Lord Powis was a Jacobite, and that in Wales, in that year, in the first of William and Mary, there were a great many Jacobites; and so there were in the Highlands of Scotland, and so there were elsewhere. It is very unlikely, I think, that Alexander would fly to Wales for that purpose; still, some of them say that that was the reason why he went to Wales. Then there was a story told, more or less in favour amongst them, as to how he went. If Alexander had said, before there was any lis mota, "I fled from Scotland," I should not think that that statement was necessarily to be disbelieved because he came in a roundabout way from Inverness, sailing in a fishing-boat to Cardigan Bay. I should have thought that any man wanting to do that would have come over, starting from the

west coast of Scotland instead of from the east. Still, I think that the people may have made a mistake about it. Yet, when you examine it, it looks completely like a thing which is not to be found in a genuine tradition of a statement by Alexander of what he did do, but which is what people would get up after talking one with the other, they being anxious to account for his coming over. It resembles the old story that is told in the legends about Macbeth and Macduff, that, when Macduff fled, he seized a loaf from the table, in order that he might have some thing to pay to carry him over the ferry. I do not suppose that anybody would think that that was really acted upon as a true matter. So, I think here. The story, if it was really true, as told by one of the witnesses, would shew that the man was an impostor, and was talking like Alexander, but the real man knew perfectly well that the only battle which was fought in 1689 was won by the Pretender's forces. He knew perfectly that his father Thomas was never taken into custody at all; but in the tradition which is told now, we are told that he said afterwards, that he and, I think, his brother Simon, but at all events, that he and Thomas fought in the same battle, and that the battle was lost, and that he was taken prisoner when he fled. Looking at it, you cannot suppose that it was really a genuine account of what was said.

I do not wish to decide one way or the other whether these statements being post litem motam are on that account not admissible by the law of Scotland; but I do say that if they are admissible at all they are not so made here that any reasonable person would give any weight to them. That is all that I think it at all necessary to say. I have not, myself, the slightest doubt upon the matter. It is not proved, no evidence has been given which can be acted upon, that the Alexander in Wales was identical with the Alexander in Scotland. I think that the evidence of the handwriting of the bond proves that he was not. I have not attached much weight or importance to the document which has been recently found in the bills of mortality, because I think it is perfectly true that that only goes to shew that at that time the minister of that parish did write down in his bills of mortality that Alexander the younger of Beaufort was buried

H. L. (Sc.) 1885 THE LOVAT PEERAGE. Lord Blackburn.

on that day; and if Mr. Morgan Lloyd had shewn by any other evidence that there was a conspiracy on the part of Alexander and others to pretend that he was dead, I do not know that you might not suppose that the minister would, as his friend and as part of that conspiracy, make that entry. It certainly would not prove that Alexander was dead, and if there was distinct evidence that Alexander was alive afterwards that would rebut it. But that additional piece of evidence given now tends in my mind to very greatly increase the burden of proof upon the claimant; and for the reasons which I have already mentioned, I am quite clear that the claimant has failed to make that out, and that consequently this claim should be dismissed.

EARL OF SELBORNE:—

I was not able to be present during the proceedings yesterday, and I have not thought that it would be becoming for me to take a leading part in moving your Lordships' judgment upon this case; but I will say that, so far as I was able to form an opinion upon the evidence which I did hear, it was in entire accordance with the conclusions to which my noble and learned friend has come.

What struck me (and I do not think that what took place yesterday, so far as I have been able to glance at it, would have diminished that impression) was this: that you have to account for the absence of any claim to the status, the title, and the property which are now claimed for a period of above a century. There might be motives which a student of the human mind can conceive for such abstinence;—religious motives, self-abnegation, retirement from the world, some romantic temperament, something of that kind might account for such a thing. But under those circumstances it must be expected that there would be the greatest possible care taken to prevent your identity being traced, or to prevent other people bringing you forward to make that claim, which from such motives you had renounced. No motives of that kind are for a moment suggested or hinted here. The only suggested motives are these: That this young man was in danger, I will assume, of his life—for that is really the nature of the suggestion—for one or other, or both of two causes: the

first that he had taken part in the rising of Claverhouse, in the year 1689. That I may dismiss as an absolutely inadequate reason, unfit to be seriously propounded for a single moment. That was a rising which, though it might by the successful party have been technically treated as a rebellion, was under such circumstances that it is not consistent with à priori probability, or with any historical fact, to suppose that it would have been so treated, except, possibly, flagrante bello, and at the moment when the rising took place, or within a very short period afterwards; and even then it is in the last degree unlikely that it would be so treated as to a subordinate officer in the position of this young man. To suppose that he would have remained for all the rest of his life, till he passed the age of a hundred, in retirement, as a miner in Wales, merely for that reason, is so preposterous that I will not bestow another word upon it.

Then comes the other reason, which, as the facts are stated, seems to me to be equally preposterous—that he was reported or reputed to have killed a fiddler; and for the moment I will suppose that that reputation might have had some foundation, although there is no proof of it. If he felt that he was in danger of losing his life for the crime of murder, or of suffering some less penalty for the offence of manslaughter, and was so much afraid of the consequences, that, although no proceedings are shewn to have been at any time instituted against him for it, he thought it necessary to fly his country, as long as that motive was operating upon his mind he would certainly have concealed his identity; and even if, in a country where Frasers are said not to abound, he had continued to sign the name of Alexander Fraser, he certainly would not have told everybody that he was Lord Lovat, and that he belonged to the Beaufort family, so as to become commonly known, according to the tradition set up, as being the person who upon that theory was flying from justice and thought it absolutely necessary to keep himself concealed. He would have been in more danger of the law in Wales than in the Highlands of Scotland, beyond all possibility of doubt. These theories of motive therefore are preposterous and absurd.

That being so, you have the fact that this claim is made after the lapse of above a hundred years, by persons who represent

H. L. (Sc.) 1885 THE LOVAT PEERAGE. Earl of Selborne.

those who had never brought it forward when the facts were recent, and could be in all points satisfactorily investigated, who had no motive for not bringing it forward, of an intelligible or rational kind; and it is sought to be supported by evidence of what is called family tradition—not tradition of the Beaufort family, not tradition of the Lovat family, but tradition of the family of a certain miner who spent all his life in mining in Wales, who had the name of Alexander Fraser. That was the impression made upon me by the case. As I said, I will not go further into it, because during some parts of the proceedings I was unavoidably absent; but certainly, as far as I have followed them, my judgment entirely concurs with the motion which has been made.

LORD BRAMWELL:—

So far as your Lordships are concerned, I daresay I need add nothing to that which has been said already; but as I believe and hope that this is an honest claim, I think it due to the claimant, against whom my opinion is most strongly, to let him know my reasons for deciding against him, in order that he may see that I have at least done my best to form a correct conclusion upon the matter, and that I have not merely adopted the opinions of other noble Lords.

To my mind the question to be considered in this case is whether the Alexander Fraser who died in the year 1776 is identified with the Alexander Fraser who was the son of Thomas of Beaufort. That is the question which your Lordships have to determine. Now, in my opinion, the evidence of the claimant himself, (I do not mean his particular evidence, but the evidence brought forward on his behalf,) not only does not make that out, but has shewn that there were two men, and that the Alexander who died in 1776 was not the Alexander who was the son of Thomas of Beaufort. I will state to your Lordships my reasons as shortly as I possibly can.

The first thing to be considered is what would be the age of the Alexander who died in 1776, if he was the Alexander who was the son of Thomas of Beaufort. I think one ought a little to complain of the pedigree that is stated in the case, and of some

things which are stated in the case as matters of fact that could be proved, when in reality they are nothing more than what the claimant would wish to be true. For instance, Thomas of Beaufort is said to have been married in 1665, of which there is not a particle of evidence; he may have been married ten years before, and I should think in all probability that he was.

Taking the various matters which I will not trouble your Lordships with, but particularly taking the bond of 1684, which could not have been given until the obligor was of age, that is to say, twenty-one, Alexander must have been born in or before the year 1663, and therefore in the year when he is supposed to have died he must have been at least 113 years old. That is not an impossibility, but it is an eminent improbability; the probabilities are millions upon millions to one against its being true. Not only that, but he must have been working at daily wages of 1*s.* 4*d.*, I think the year before he died; that is to say, he must have been working at manual labour, manifestly from the entry, when he was at least 112 years old. That is eminently improbable. He must have remained unmarried until the year 1738, when he was at least seventy-five years of age, and then he is said to have eloped with a young woman. One does not wish to create a smile, but certainly that is not an age at which one would suppose that a young woman of respectable family, as she is stated to have been, would have eloped with a miner in the condition of this man. After his marriage in 1738, when he was seventy-five years old or more, he must have had four children, the last of whom was born in the year 1759, when the father must have been at least ninety-five years old. Now, it is not one improbability only, but this is positively a congeries of improbabilities so utterly unlikely that it is impossible to suppose that they could have existed in the case of one man.

Then we have an entire absence of evidence of any claim being made by him upon Scotland or his Scotch relations, or of any communication taking place between him and them, although he must have been in a state of the greatest poverty, or at least, I will not say of the greatest poverty, because 1*s.* 4*d.* a-day I dare say was very decent wages for that time in that part of the world, but when he was undoubtedly a poor man, we find him not making

H. L. (Sc.) 1885 THE LOVAT PEERAGE. Lord Bramwell.

any claim upon his relations at all, not making any claim to the peerage, or any claim to the estates. It is said that he did write a letter, but that Simon Lord Lovat answered him, that if he made any claim, he, Simon Lord Lovat would cause him to be hung, or give him up to justice, or some expression of that character. I utterly disbelieve that Simon Lord Lovat would have been indiscreet enough to write a letter which would in effect have been an admission of the title of this Alexander. But if he had written it, as was suggested by my noble and learned friend at my side (Lord FitzGerald), it is surely a letter which would have been preserved.

Here is another statement, which I think is hardly right on the part of those who prepared this case: "From the time of the flight of Alexander of Beaufort to Wales to the date of his death, in 1776, his return to the Highlands would have been attended with danger." On what ground? Your Lordships have heard what has been said by the noble and learned Lord opposite. As to its being attended with any danger on account of his complicity in the rising in 1689, it is impossible to suppose that it would have been attended with any danger of any sort or kind, when you consider the way in which, for instance, by George the First, Simon Lord Lovat had been allowed to take the estates, and the sort of pardon that had been granted for antecedent offences.

But there is the other charge. Supposing that he had returned, where would have been his peril? Supposing that he had slain a musician, unless the witnesses to that misdeed and the other things against him were as long lived as himself, which I think is making the improbability still greater, he might have gone back to Scotland with perfect safety, and stated who he was and what his claims were.

Then you have the quiet assumption of the title by Simon Lord Lovat, and the sort of general acquiescence in it on the part of the whole family without there being any objection taken to it at all.

Then the exclamations of Archibald Campbell Fraser, upon whose death the present family came into possession, seem to me to shew that the claimant's case is an unfounded one, because those exclamations import, not that he, the man who made them,

H. L. (Sc.) 1885 THE LOVAT PEERAGE. Lord Bramwell.

was wrongfully in possession, but that by some possibility, after he was gone, there would be somebody who would be entitled in preference to the Strichen branch. That is how I understand them, and that seems to me to be the effect of them.

A similar observation may be made upon some of the expressions that are used in the statement of what Alexander said on his death-bed to this effect: "Keep up the names, for a time may come," as indicating not so much that he was then entitled as that at some future time he might be.

I said that upon the claimant's case I should have been content to decide against him; but we have to-day the proof of the handwriting. Unless some strange thing should have taken place after the time when he signed that bond in 1684, it is impossible to say that the man who signed that bond was the man who signed the receipt in the year 1737. It is still more strange that before he got so very old, and while he was still capable of writing pretty well, his handwriting should have altered to the extent to which the handwriting of 1684 differs from the other handwriting.

With respect to the tombstone it is utterly impossible to rely upon it. It struck me that the witness, Mr. Bulkeley (and I do not understand that any imputation is suggested against him), was a respectable witness, and was telling us that which he himself believed to be true. But somehow or another he must have made some mistake about it, for the stone exists, I believe, still, and might have been brought here, or a photographic copy of it might have been submitted to the House, and it might have been seen whether there were any words or letters upon it which he did not think material, (because he was busy with the surname and the words "Beauly," and "Beaufort," and "Scotland,") but which would have shewn what really was the inscription. But it is not brought here by the claimant, who undoubtedly might either have brought it or might have brought a photographic copy of it; and I cannot help thinking that Mr. Bulkeley must somehow or another have been mistaken as to the date.

Again, supposing that it was there once, the way in which I account for it is, that it was, in all probability, the tombstone of

H. L. (Sc.) 1885 THE LOVAT PEERAGE. Lord Bramwell.

the man who went to Scotland and died, I think, in the year 1818, or somewhere thereabouts, that is to say, the great-grandfather of the claimant; and it is much more likely that it should be a legible tombstone, if it is no older than that, than if it is 110 years old, as it would be if it was the tomb of Alexander.

One word as to the tradition. I believe that the witnesses who have told us that story about the tradition have told us a true story, in this sense, that they did hear from the father and the uncle, (and the claimant, I think, mentioned his grandfather also,) those things which they have sworn before us they did hear, and I have no doubt that that tradition existed in the family. But it will be said, then, How could it exist unless it was true? That is a question which it is not very easy to answer, except in the sort of general way of saying that people will make mistakes, that people do make mistakes, that they mix up two persons, and think that that which is true of one is true of another. But there is a thing about the tradition which, to my mind, shews that it is inaccurate, and it is this: (I do not know whether it was noticed by my noble and learned friend opposite, because I could not hear very distinctly). It is said that Alexander, who killed this musician, as possibly he did, and who on that account, fled from Scotland, (which, however, seems to have been a matter of questionable necessity at that time of day for such an offence as that, as I understand,) sold a horse for thirty guineas, with which he hired a boat. It must have been a very valuable horse, at that time of day, to have fetched thirty guineas, especially when its owner was not a willing seller, but obliged to sell it for what he could get for it on the spur of the moment. But there is a remarkable thing. Guineas were first coined in England in the reign of Charles II. There is no doubt that they might have got to Scotland, but it is not very likely that they did, and it is not very likely that the price would have been mentioned in guineas. There were no guineas coined in Scotland until after the Union, and, I quote from Ruding's Coinage in Britain, vol. iii., p. 451, where I find this passage under the reign of William III.: "No gold was coined in Scotland in the two preceding reigns." So that there were no Scotch guineas in the reign of Charles II.,

or in the reign of James II. Of course it is perfectly possible that English guineas might have got as far north as Inverness, although there is a Scottish Act which says, (it is not worth while to trouble your Lordships with it,) what shall be the current coin of the realm, which does not include English guineas. It is no doubt possible that guineas might have got to Scotland, and as far north as Inverness, although they were not coined in Scotland but in England. But is it not eminently improbable again that this man should in the year 1689 have had a horse that was worth thirty guineas, and should have found a customer that would give thirty guineas for it, and that the bargain should have been made in guineas instead of some Scotch coin current at the time? Now I believe the respectable people who have been called before us, when they state that the tradition had existed in the family; but I say that that item in that tradition, to my mind, shews that there has been an attributing to one man and to one date, of that which was attributable to another.

So much for the evidence that was brought forward by the claimant. I declare that if there had been no evidence given on the part of those who object to the claim, I should have been prepared to say, not only that the claimant had not shewn the identity of the Alexander, the son of Thomas of Beaufort, with the Alexander who died in 1776, but that he had established that they must inevitably have been two different persons. But, in addition to that, we have the evidence in the bill of mortality that Alexander died in the year 1689. We have evidence there of the death of an Alexander Fraser, whose description is that of the man who is supposed to have lived nearly ninety years more, and then to have died in Wales. There is just one other remark which I should like to make, and which I ought to have made before. If this Alexander did kill a musician, and did run away from Scotland to Wales to do what is called hide himself in a mine, (as though people went down into mines and stayed there, and never appeared on the surface again, and never could be seen or spoken to,) it is a most extraordinary thing if he took the pains to go all that distance and conceal

H. L. (Sc.) 1885 THE LOVAT PEERAGE. Lord Bramwell.

himself in that way, that he should apparently have made no secret of what it was that took him there. When a case comes before one, if, after deciding it, a doubt remains in one's mind as to whether the decision is right, it is a very painful condition of things; but, my Lords, I declare that I never felt more satisfied in my life in any case that came before me as to what the truth is, than I do in the present case; and I entirely concur in the conclusions and opinions that have been expressed.

LORD FITZGERALD:—

My Lords, I entirely concur in the motion which the Committee is about to adopt, and I shall make only a very few observations upon the general features of the case.

As we have had evidence on both sides, both for the claimant and against, I may state that the result which it has left upon my mind is, that on one side it has been clearly and satisfactorily established that Alexander Fraser of Beaufort died somewhere about 1689 without issue, and that he did not fly from Scotland, and did not go to Wales. On the other hand as a necessary result from that, the claimant has entirely failed in establishing the identity of the Alexander (I will not call him Fraser, but whatever his name was,—spelt "fereser,") with the Alexander of Beaufort save by the tradition of the claimant's own immediate family, to which I will presently advert.

In reference to Alexander of Beaufort, the tradition of the family of Scotland and a succession of public documents all go the same way, independently of the recognition of Simon as Lord Lovat and as the owner of the estates, and of the descent of those estates to his immediate children. We have first the fact that Alexander disappears in 1689, he is never seen afterwards, by any one from Scotland, and there is no tradition in Scotland that he was alive or that he had fled, or that he had left issue, on the contrary, we find his death mentioned in the bills of mortality.

Now, a great deal of discussion went on yesterday as to the admission of those bills: but after all that discussion was only with a view of establishing their authenticity; and their authen-

ticity, in my mind, was very clearly established. In them is entered the full description of Alexander of Beaufort, and the fact of his death in 1689; and from 1689 in Scotland he is not heard of. That is consistent with everything that occurred,—with all the traditions of the family in Scotland, who all spoke of him as dead without issue, and with a succession of public documents, in reference to which it is difficult to suppose that there could be error. We have that singular proceeding which was given in evidence to-day and received without objection, I mean the proceedings in Scotland in 1698, as commencing rather in 1697 against those who had been concerned in the rising of Dundee, which proceedings contain the important statement that they were against "Captain Simeon Fraser" (or Simon Fraser) "eldest lawful son to Thomas Fraser of Beaufort." That is put upon record in 1697, it is continued in the record of 1698, and under what circumstances? I can well conceive, though there may have been an effort to conceal him upon the one side, that there were and would have been still greater efforts upon the other side, if any belief then existed, and if the fact was, that Alexander was then alive and had fled, to include him in the indictment, if he had been, according to the opening statement here, concerned in the rising of Dundee. That document embraced the treasons created by the rising of Dundee; and, indeed, if the report in "Howell's State Trials" were referred to an examination of the evidence against Thomas of Beaufort, and against his son, would prove the treasonable part they took. Many Alexanders are named and described in that proceeding, but there is no mention of the name of Alexander of Beaufort; and on the contrary, Simon of Beaufort is treated as the eldest lawful son of his father, Thomas of Beaufort. That was done at a time when all these matters must have been well known in Scotland, and when there would be every reason to include Alexander by name for the purpose of his attainder, and the catching of an estate which would descend to him if he was unattainted. He never was attainted. That succession of documents, of which I only allude to one, clearly establish to my mind that Alexander of Beaufort died, that he died without issue, that he did not fly

H. L. (Sc.) 1885 THE LOVAT PEERAGE. Lord FitzGerald.

to Wales, and that he was not the same person as the Alexander "fereser," the ancestor of the present claimant.

Now we turn to the case of the claimant. It is beset with this improbability in the first instance, that if Alexander of Beaufort did fly he fled in 1689, and eighty-seven years elapsed from the time of his flight to the time of his death. But during that time, though he was the lawful Lord Lovat after the death of Thomas of Beaufort, though he was unattainted, though he was the person who had the right and title to the estates, there is no claim whatever from beginning to end urged in his behalf, or mentioned, until the period of his death. There was one alleged, but it was of such a character that affected the credit of the witness who made it. The statement was, that when Alexander heard of the death of his father, Thomas of Beaufort, he wrote to Simon, Lord Lovat, stating that he would return and claim the estates. This letter is said to have come from a man who was then concealing himself in Wales, and it is stated that the answer he got from his brother was, "You had better not come, because you have committed this murder, and I will give you up to justice." We learn the character of Simon Lord Lovat from history, and he is said to have been a very far-sighted and clever man—clever and unscrupulous—but it would be most amazing that Simon Lord Lovat should have written such a letter; and if that letter ever existed, still more surprising would it be to find that it was not forthcoming on the present occasion. It would be preserved as a record of incalculable value, which would have enabled the descendants of Alexander Fraser at any time to have claimed the title and estates out of the hands of Simon Lord Lovat and his descendants.

I have remarked that there was never a word said about this claim until you come to the death of Alexander "fereser," if he was the same person as Alexander of Beaufort, who must have been, at the period of his death, at least either 113 or 114 years of age. It is then stated to be the family tradition that, having assembled his children about him when he was on his death-bed, did not say to them: "I am the rightful Lord Lovat," or "I am entitled to the estates which are wrongfully withheld from me

by my brother Simon"; but he advises them to retain their names, for that the time might come thereafter when they would be called back to Scotland to their rights. If he had said then that he was the rightful Lord Lovat, as he had been for a period of over eighty years if the case of the claimant is right, there would be something in it.

I do not think it necessary to go in detail through any further branches of the case, save this: We admitted family declarations here proved by the claimant and other members of his family. I have no doubt, speaking of the claimant, that he believed what he was telling us to be true; but I think that we went to the very limits, if not outside the limits of the law, in admitting those declarations, and I hope that their admission in this Lovat case will not be made a precedent in other cases. It is true that my noble and learned friend opposite guarded their admission by pointing out the extent to which they would be received. But what were those statements after all? This family, the descendants of Alexander Fraser, had somehow persuaded themselves that they had a claim to these estates, possibly arising from the visit of old John Fraser to Scotland; and it is but a rehearsal amongst themselves of what one said to the other after this very dispute had arisen, after the point had been reached, when they were proposing to make the claim to the estates, and upon the very occasion when they were making this claim. Of course declarations made under such circumstances are of no real value, and in my judgment it is certainly going to the extreme limit to admit them at all. I therefore attribute to these statements no value whatever, further than as shewing that the members of the family who thus conversed believed these things to be true, having persuaded themselves into the belief.

The only other topic upon which I would like to say a word is the tombstone. As I heard the opening in this case, as I heard the discussions in the course of it, it was alleged that the tombstone, of which evidence was to be given, was the tombstone of Alexander Fraser, the ancestor of the claimant; and we were told that it had been removed from the churchyard, that it had been built in under the pillars near the pulpit, and that only one portion was visible, namely, the date 1776; but that if that

H. L. (Sc.) 1885 THE LOVAT PEERAGE. Lord FitzGerald.

could be removed there would appear the tombstone of Alexander Fraser in 1776 with a description of who he was. No doubt, if so far back as 1776 such an inscription as was afterwards suggested was put upon his tombstone, it would be a matter for serious consideration. But in the course of the case we were told too that there was other evidence as to what this tombstone was; and it was then that Mr. Bulkeley's name was referred to; and I understood up to the close of yesterday that the tombstone of which Mr. Bulkeley was brought to speak was the same tombstone as that which was afterwards buried under the pillars, and that it was the tombstone of Alexander, the ancestor of the claimant. It turns out now to be totally different; it is not the same; it is not the tombstone of 1776 at all, unless Alexander had two tombstones, one under the pillar and the other in the churchyard. Again Mr. Bulkeley, who, I have no doubt, told us nothing that he did not believe to be true, tells us that it was five years ago when he made this examination, while the tombstone which was said to be the tombstone of Alexander was removed about fifteen years ago, and used in the structure of the church. Then, there is the singular thing that the claimant does not send to examine it. Mr. Bulkeley, I have no doubt, did see a tombstone, with the name of Fraser on it, and a very suspicious line across it, "Beaufort, Beauly, Scotland." I tried to get at the Christian name, even a letter of it, the final letter, but no one is sent to examine that, which, according to Mr. Bulkeley, is there at the present day. The interpretation that I put upon that is that the old man returned from Scotland, full of this story of his right to the title and estates, and that when he died the family put that tombstone there and recorded on the tombstone of John Fraser, John, the old man who went to Scotland, the three words, "Beaufort, Beauly, Scotland," in proof of the claim that is now made.

My Lords, I am perfectly satisfied that the claimant has entirely failed, and that the consequences must follow.

LORD BLACKBURN:—

I propose that we should adopt the mode that was adopted formerly, in the case of Wigton and Fleming, by Lord Thurlow,

"Resolved, that it is the opinion of the Committee that John Fraser has no right to the title, dignity, and honours claimed in his petition." H. L. (Sc.) 1885 THE LOVAT PEERAGE.

It was then moved, "That in the opinion of the Committee, John Fraser has no right to the title, dignity, and honours claimed in his petition, and that a report be made to the House accordingly."

The resolution was reported to the House and agreed to.

Lords' Journals, 25th and 26th June, 1885.

Agents for claimant, John Fraser: *H. W. Christmas*, for *Innes & Mackay, Inverness.*

Agents for opposing petitioner, Lord Lovat; *Grahames Currey, & Spens*, for *John Clerk, Brodie, & Sons, W.S., Edinburgh.*

[HOUSE OF LORDS.]

THE DUKE OF HAMILTON. . . . . APPELLANT; H. L. (Sc.) 1885 *May* 13.

AND

DUNLOP AND ANOTHER . . . . . RESPONDENTS.

Coal—"Disposition of Lands with a Reservation of the Liberty of working the Coal"—Right of Property retained.

Where the owner conveys lands to a singular successor or other person, reserving the "liberty of working the coal" in those lands, he must be taken to have reserved the estate of coal (unless there are clear words in the deed qualifying that right of property) with which he stands vested by infeftment at the date of the conveyance.

APPEAL from the Second Division of the Court of Session, Scotland.

In 1793 John Dunlop, of Rosebank, the respondent's ancestor, was the proprietor of Smiddy Croft, Lanarkshire, under disposition of the 9th of November, 1792, including the coal therein. The lands of Smiddy Croft were situate near to Hamilton Palace, and the then Duke of Hamilton, predecessor of the appellant, was proprietor of the lands of Mid and East Coatts, which lay at a considerable distance from the palace. The Duke was desirous

H. L. (Sc.) 1885 DUKE OF HAMILTON v. DUNLOP.

of giving part of Mid and East Coatts in exchange for Smiddy Crofts, and John Dunlop was willing to exchange. The Duke, holding his land under a strict entail, had to obtain the consent of the sheriff to the transfer, who, on being applied to, appointed two valuers to inspect the respective lands. The valuers reported that the lands proposed to be exchanged were of about equal value, but they recommended the reservation of the minerals. The contract of excambion was executed in 1793, and by this deed John Dunlop disponed to the then Duke of Hamilton and his heirs of tailzie "all and haill the kirklands of Smiddy Croft with the houses, biggings, yard, and hail pertinents of the same . . . reserving to the said John Dunlop and his heirs and successors in the foresaid parts of the lands of Mid and East Coatts, if conveyed with that privilege, the liberty of working coal and other metals, fossils and minerals, in the foresaid parts of the lands of Smiddy Croft above disponed, by pitts, shanks, or eyes put down in such lands adjoining to the said lands of Smiddy Croft as they may acquire hereafter; but declaring allways, as it is hereby particularly declared, that they shall have no liberty to pitt, shank, or make eyes, roads, ways, or passages, to or from the same, for working of any coal or other metals, fossil and minerals, upon the surface of the foresaid part of the lands of Smiddy Croft, unless by the express consent of the said Duke, his heirs and successors therein." The Duke on his part disponed to John Dunlop the agreed on portion of Mid and East Coatts, reserving to the Duke, his heirs and successors, inter alia, the liberty of working coal and other metals, fossils and minerals, in Mid and East Coatts. The Duke further reserved power to make roads, ways, &c., and do surface damage, but only during the continuance of the then present lease of the coal, in terms of that lease. After that term had expired the Duke was to exercise his right to work the coals only by pits sunk in the adjoining land, subject to a small exception.

John Dunlop was duly enfeft in Mid and East Coatts. In 1801 he sold the estate of Rosebank, including Mid and East Coatts, to a Mr. Dale. The coal in Smiddy Croft was not included in the sale; nor was it mentioned in the conveyance. In 1820 John Dunlop died. In 1883 James Dunlop, grand-nephew and nearest

lawful heir of John Dunlop, and another, the respondents, brought an action against the appellant, the Duke of Hamilton (who had shortly before let the minerals in Smiddy Croft, and in fact they were stated at the bar of the House as then having been actually worked out) concluding for declarator that the whole coals, &c., under the lands of Smiddy Croft, conveyed by John Dunlop to the appellant's predecessor, "belonged to and were vested in the said deceased John Dunlop at the date of his death, and now belonged in property to the pursuers: and that the pursuers have the sole and exclusive right of working, winning, and carrying away the said coal and other metals, fossils and minerals, subject only to the restrictions contained in the said contract of excambion." They also asked for interdict from working, and that the appellant ought to be decerned to immediately flit and remove himself, servants and tenants, from the said coal and all pits, mines, workings, ways, and levels therein, and leave the same void and redd, and for a full account of the appellant's whole intromissions with the said coal, &c., and of all rents and royalties in respect of the said coal, &c., or the working and winning thereof, or for and in respect of any wayleave, or right of passage, or transit in, through, or upon the same or any part thereof.

The pleas in law for the respondents, the pursuers, were: (1.) John Dunlop having acquired the minerals in question by the disposition of the 9th of November, 1792, and never having been divested thereof, the pursuer, James Dunlop, as his nearest and lawful heir, is in right of the said minerals, and as the defender has let the same and otherwise intromitted therewith, and disputes the pursuers' right thereto, the pursuers are entitled to have decree in terms of the conclusions of the summons. (2.) Upon a sound construction of the said contract of excambion, the property of the minerals in and under the lands of Smiddy Croft therein mentioned remained vested in the said John Dunlop, subject only to the limitations of the modes of use expressed in the said contract.

The pleas in law for the appellant were, inter alia: (2.) prescription; (4.) the said reserved right being one of servitude, has been extinguished non utendo; (5.) Separatim, The said right being a mere personal privilege, and by the terms thereof

H. L. (Sc.) 1885 — DUKE OF HAMILTON v. DUNLOP.

only conceived in favour of John Dunlop and his heirs succeeding in the lands of Mid and East Coatts, so long as they remained proprietors thereof, the defender should be assoilzied.

On the 18th of March, 1884, the Lord Ordinary (Lord Kinnear) pronounced the following interlocutor: "Finds and declares, interdicts, prohibits, and discharges, and decerns and ordains in terms of the conclusions of the summons, other than the conclusions for count, reckoning and payment; Finds the defender liable in expenses."

The appellant lodged a reclaiming note; and on the 20th of June, 1884, the Second Division of the Court of Session adhered (1). On a subsequent date leave to appeal was granted. On appeal,

May 13. *Davey*, Q.C., and *Graham Murray*, contended for the appellant, that the reservation was not a reservation of property in the coal which John Dunlop had before 1793, but the reservation was at most a mere personal right or license to John Dunlop and his heirs and successors in the lands of Mid and East Coatts. If it were a mere personal license or servitude, then it was lost by non utendo, and would not affect the right of wayleave. Even if they failed on the first point the interdict was too large, for it ordered the appellant to flit and remove, whereas it ought to have been that they should be allowed to use the land subject to the reservation of the rights belonging to the respondent. They commented upon *Davidson* v. *Duke of Hamilton* (2); *Bain* v. *Duke of Hamilton* (3); *Duke of Hamilton* v. *Graham* (4); see also Erskine, 2 : 6 : 5; Lord Craigie in *Turner* v. *Ballandene* (5); Dallas' Styles; Ball's Styles, vol. i., p. 89; and Erskine, 2 : 6 : 5.

LORD WATSON mentioned the case of *Livingston* in 1776 and *Magistrates of Innerkeithing* v. *Mowbray* (6).

(1) 11 Court Sess. Cas. 4th Series, 963.

(2) May 15, 1822. 1 Court Sess. Cas. 1st Series (2nd Ed.), 385.

(3) 1865. 3 Court Sess. Cas. 3rd Series, 821.

(4) July 28, 1871, Law Rep. 2 H. L., Sc. 166; 7 Court Sess. Cas. 3rd Series, 981; and 6 Ibid. 965.

(5) 1834. 10 Court Sess. Cas. 1st Series, at p. 418; in H. L. 7 Will. & Sh. 163.

(6) The case of *Livingston* is only reported, and that very briefly, in 5 Bro. Sup. to Mor. 559. The case came up on appeal to the House of Lords (see H. L. Journals, vol. xxxv., pp. 34, 66,

The Lord Advocate (*Balfour*, Q.C.) and Sir *F. Herschell*, S.G., appeared for the respondents, but were not called upon.

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108) and was affirmed the 21st of March, 1777. The parties were John Livingston Mitchell, appellant; the York Buildings Company, Earl of Errol, and King, respondents.

The following facts are taken from the printed papers of the appeal: see Collection, House of Lords Library, vol. for 1777:—

The lands of Madiston, part of the barony of Haining, Stirlingshire, belonged to the Earls of Callendar, and were by them held immediately of the Crown.

In 1647 the then Earl of Callendar granted a charter of certain parts of these lands to Edward Marshall and his two sons, the appellant's ancestors, to be holden of the Earl and his successors in feu farm. The deed contained this reservation, "excepting and reserving always to the said Earl and his foresaids (heirs and successors), liberty and privilege to win coal, lime, and limestone, making of shanks, casting of holes and sinks and making of ways and passages thereto, within any part of the said land for payment to the said Edward Marshall, his sons and their foresaids, of what losses they shall sustain upon their arable land thereby, at the sight of two honest men."

After the date of the feu charter these lands, which were described as wester and the north room of Madiston, were named Craigend by the appellant's ancestor. In the subsequent charters and precepts from the family of Callendar to the heirs and successors of Edward Marshall, the above reservation was repeated.

In 1715 the Earl of Linlithgow and Callendar was attainted, and his estates were forfeited. The appellant's father, Alexander Mitchell, then in possession of these lands, took advantage of the Clan Act, 1 Geo. 1, and obtained in 1716 a charter, proceeding on a narrative of the Earl's forfeiture of his portion of the forfeited estates, from the Barons of the Exchequer, which contained a clause of novadamus.

In 1720 the barony of Haining, with other estates of the Earl of Linlithgow and Callendar, were sold to the York Buildings Company by the Commissioners of forfeited estates in Scotland. Previous to his forfeiture the Earl had granted a lease of the coal in the whole lands of Madiston, and in the rent roll made out by the Commissioners, and according to which it was sold at twenty-four years' purchase to the York Buildings Company, there was mentioned the "coal of Madiston as then yielding £400 scots of yearly rent." And in 1748 the Barons of the Exchequer executed a disposition of these estates to the company, including particularly all and whole the lands and barony of Haining containing, inter alia, the "town and lands of Madiston" with "coal and coal heughs of the same." The charter contained a general saving clause in favour of those who had entered exception before the Lords of Session and had obtained decreets.

About 1775, King, sub-lessee of the coal mines of Madiston under the Earl of Errol, whose father had obtained from the York Buildings Company a lease of the estate of Callendar and coal mines, opened a pit near the boundary of the appellant's land and drove levels and commenced to work out the coal under that part of Madiston called Craigend. Thereupon the appellant applied for interdict, and subsequently brought

H. L. (Sc.) 1885 DUKE OF HAMILTON v. DUNLOP.

EARL OF SELBORNE, L.C.:—

It appears to me that the unanimous decision of the Second Division of the Court of Session, agreeing with that of the Lord Ordinary, in this case is right.

an action against the York Buildings Company of declarator that he had the sole exclusive right to the coal under his lands. The action of declarator and suspension being consolidated, on the 31st of January, 1776, the Lord Ordinary Kames pronounced this interlocutor: "Find that the York Buildings Company has right to the coal in the lands in question; and that Mr. Livingston Mitchell has no right thereto; find that the York Buildings Company's tackmen have right to continue their possession of the said coal; assoilzies the defender from the process of declarator." The appellant reclaimed to the Court of Session, but they, on the 10th of July, 1776, adhered to the Lord Ordinary's interlocutor.

John Livingston Mitchell lodged an appeal to this House. In his printed case he contended that, the lands being conveyed with parts and pertinents, that was sufficient to carry the coal. Erskine, 2: 6: 1; Blackstone, b. 2, c. 2. The reservation only imported a servitude of right of common, and the reservation was now cut off by the negative prescription of forty years. But whatever was the import of the reservation, he was entitled to the land in virtue of the Clan Act, free from any burden affecting them in the person of his superior. By that Act the legislature meant that every right in the superior affecting the lands, should go to the vassal. And this was borne out by the clause directing the Barons of Exchequer to grant charters with clauses of novadamus. Also, as the charter of 1716 contained no reservation, the appellant, in virtue of the sasine and possession following it had a prescriptive right to the coal: Innes, Dec. 31, 1695; Fountainhall, vol. i., 694, Mor. 11212: McDougall, July 12, 1739, Mor. 10953; Douglas, Feb. 2, 1753, Mor. 10955. Craigend had long before the sale to the York Buildings Company become a distinct estate from that of Madiston, and there being no mention of the coal of Craigend in the disposition to them, it could not be meant to include under the coal of Madiston the coal of Craigend. The case was signed by Henry Dundas al. Wedderburn, and J. Dunning, as Counsel.

The respondents contended:—At the date of the forfeiture, the coal in the lands in question, which were part of the lands of Madiston, belonged in property to the Earl of Callendar, and fell to the Crown on the forfeiture. Now the right was in the respondents who had purchased the forfeited estates according to a rent roll, wherein the coal of Madiston was specially mentioned; and they stood seised in the town and lands of Madiston, with the coal and coal heughs of the same without reservation. The right could not be lost by non utendo to the appellant, for one could not object the negative prescription, without pleading a right in himself, besides the coal in the whole of Madiston being one undivided estate, the working of part of the coal must be ascribed to every part of it. The vassal who proved loyal, by the Clan Act obtained the privilege to hold immediately of the Crown the lands and tenements

I will first make some observations which occur to me, which shall be but few, upon what I regard as the good sense and reasonable view of such a deed as the present, even if there were not authority bearing on the matter. You have words of reservation, and you have a prior title to the whole property in these coals and minerals in the person who is making this reservation in his own favour. What is reserved? If there be no limit of time, if it be to Dunlop and his heirs for ever, it is a perpetual reservation. What is the subject of the reservation? The right to take away the whole of those coals and minerals. A perpetual right to the whole possible profits and benefit of property is primâ facie very much like the whole beneficial interest in that property; at least, when you find that the man who had it before leaves, as a reservation, something out of his grant, and that this is the quantum of the reservation in point of matter and in point of time, the most sensible and reasonable construction, if there be no technical difficulty, is that he means to reserve, as to that subject, the property which he had before, with such superadded privileges as to the means of getting at it and enjoying it as are found in the deed; and there are such.

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he formerly held of the subject superior, who entered into rebellion, by the same tenure as that superior held them, that is, the interjected mediate superiority was abolished, and the vassal was relieved of the duties and services he owed his former immediate subject superior. But the Act went no further, no separate or reserved estate or interest of the superior is given to the vassal, directly or by any fair construction of the statute. And the charter of novadamus from the Crown could not bestow anything more than he was entitled to claim under the Clan Act, it being an established rule that such clauses in charters from the Crown confer nothing new unless proceeding on the authority of the King's sign manual. The purpose of inserting such clauses in charters granted in consequence of the Clan Act, was to supply defects in the former titles to the right of superiority, and to release the casualties which might have been incurred during the possession of the attained superior.

There was no doubt that coal is understood to be comprehended as pertinent in an unlimited grant of lands, but there was also no doubt that coal may be reserved to the grantor, and that by that reservation the coal became a distinct, separate tenement from the lands, and nothing but an express grant of the coal could afterwards unite them in the person of the vassal. Signed as Counsel by E. Thurlow; Alexander Wight.

On the 21st of March, 1777, this House after hearing counsel for both parties, affirmed the interlocutors appealed from, and dismissed the appeal. Lords' Journal, vol. xxxv., p. 108.

H. L. (Sc.) 1885 DUKE OF HAMILTON v. DUNLOP. Earl of Selborne, L.C.

But I quite admit that these words, being capable of being understood apart from the subject, and apart from the previous title and the words of reservation, as not granting property but granting a right to deal with property, if even in the case of a clause of reservation with such a previous title there had been a series of authorities determining that something more was necessary, and that without more they would operate as a license only, I might have hesitated to overrule such authorities. But when I find that the authorities are all the other way, concurring with what strikes me as the common sense of the case and with the unanimous decision of all the judges in this particular case, I cannot be persuaded to doubt that they ought to be followed.

Now those cases, which are reported in the Supplement to Morrison, of the years 1776 and 1778 (1), although shortly reported, were plainly cases upon similar words in a contract of the same nature under similar circumstances; and if the words which shortly describe the decision of the judges are to be interpreted in their legal and natural sense, the decision was, that such words under such circumstances reserve the antecedent property in the coal and do not merely give a license as from the grantee of the coal to take a part of what would otherwise be his.

The same view prevailed in the case of *Davidson* v. *Duke of Hamilton* (2); and whether that decision was right or wrong as to the use of surface privileges, which is quite a distinct matter, it cannot possibly have been right except upon the supposition of these words reserving the original property of the grantor in the coal.

In the case of *Bain* v. *Duke of Hamilton* (3), which arose upon the question of reducing words said to have been improperly inserted in the dispositive clause of a charter of progress, I think that in determining that question it was proper, if not absolutely necessary, to consider whether those words signified the property in the coal or only signified a license or privilege to take coal belonging to somebody else. All the judges except the Lord President appear to have thought that it was necessary, or at all

(1) *Livingston of Parkhall* v. *York Buildings Company* and *Mayor of Innerkeithing* v. *Mowbray*, 5 Bro. Sup. Mor. 559, see note, ante, p. 816.

(2) May 15, 1822. 1 Court Sess. Cas. 1st Series (2nd Ed.), 385.

(3) May 19, 1865. 3 Court Sess. Cas. 3rd Series, 821.

events proper, to express an opinion upon that question, and they all did express an opinion, agreeing with what was decided in *Livingston's Case* (1), agreeing with the opinion expressed in *Davidson's Case* (2), and agreeing with what seems to me to be the reason and common sense of the matter, namely, that those words used in such an instrument and under such circumstances as words of reservation do reserve the antecedent property in the minerals of the grantor.

Those cases have been followed by the learned judges in the present instance, and for my part I think it quite impossible to reverse their decision. I therefore move that the interlocutors appealed from be affirmed and the appeal be dismissed with costs.

LORD BLACKBURN :—

I entirely agree. I think that, in the common sense of the thing, this privilege to work and win the whole of the coals is very much in substance the same thing as a right of property in the coals. There is a technical reason in Scotland that where a person is himself infeft of the whole property in the soil and the coals, and reserves a right by these words, he reserves the property in the coal ; in that case he is infeft of that right at the time and continues infeft, and has the title.

Taking that to be so as the common sense of the thing, we find also that there are several decisions pointing one way. It is said that it was not necessary for the decision in all of them that this question should be considered, but a good many of the cases point to this, that where there is a reservation of the right to win coals and minerals by the person already infeft, that reservation of the right to win coals and minerals is at least primâ facie the same thing as if it were a reservation of the whole property in the coals and minerals.

Then comes the question, Is there enough to shew that, although the reservation must be taken primâ facie, though certainly not necessarily, to have that meaning, it has been cut down in this instrument to mean less ? I must say that the rather singular terms which the conveyancer has used do not seem to me to have that effect.

(1) See note, *ante*, p. 816, and also 5 Bro. Sup. to Mor. 559.

(2) May 15, 1822. 1 Court Sess. Cas., 1st Series (2nd Ed.) 385.

H. L. (Sc.) 1885 DUKE OF HAMILTON v. DUNLOP.

LORD WATSON:—

I am of the same opinion. It appears to me to be established by authority in the law of Scotland that where the owner of lands is disponing to a singular successor or other person, if he reserves the liberty of working the coal in these lands, he must be taken to have reserved the estate of coal with which he stands vested by infeftment. That appears to me to be a very reasonable construction to put upon the words in the case of a right constituted by reservation. How far these words would be effectual to constitute a separate right to the whole coal when the lands are not conveyed it is not necessary for your Lordships to consider. But the words may be insufficient to give a reserved right to the whole estate of coal if they are in any way qualified by the context; the right may be cut down, if it should appear from other words used in the deed of conveyance that it was intended to give to the disponee the estate of coal and merely to reserve to the disponer a subordinate right to work that estate, or part of that estate. I cannot find any such words in this deed effectual to qualify the right of John Dunlop and his heirs. There seems to me to be a good reservation in favour of John Dunlop and in favour of his heirs, and that reserved right is not taken away by the addition of the somewhat unnecessary reservation of this privilege to any of the singular successors in the lands of East and Mid Coatts to whom Dunlop or his heirs might choose to convey the right.

LORD FITZGERALD concurred.

Interlocutors appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 13th May, 1885.

Agents for appellant: *Grahames, Currey, & Spens, for Tods, Murray, & Jamieson, W.S., Edinburgh.*

Agents for respondents: *Martin & Leslie, for John Clerk, Brodie & Sons, W.S., Edinburgh.*

END OF VOL. X.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1885, will be as follows:—

In the First Series,
28 Ch. D.

In the Second Series,
14 Q. B. D. 10 P. D.

In the Third Series,
10 App. Cas.

INDEX.

ACTION IN REM—Ship—Jurisdiction of Admiralty Division - - - 59
See PRACTICE. 1.

ADMINISTRATION — Scotch law — Estate of Scotch testator - - - 453
See SCOTCH LAW. 1.

ADMIRALTY—Jurisdiction - - - 59
See PRACTICE. 1.

AFTER-ACQUIRED PROPERTY - - 1
See SETTLEMENT. 1.

AGREEMENT—Construction—Mutual mistake
See MISTAKE. [325

AMENDMENT — Judgment — Action against partner in name of firm - - 680
See PRACTICE. 4.

APPEAL—Privy Council—Criminal case - 675
See PRACTICE. 3.

—— Scotch law—Bankruptcy of appellant 171
See PRACTICE. 2.

ASSETS—Partly in England, partly in Scotland
See SCOTCH LAW. 1. [453

BANKRUPTCY—Appellant - - 171
See PRACTICE. 2

—— Maliciously procuring - - - 210
See CHAMPERTY.

BASTARDY—*Service of Summons in Scotland—Jurisdiction of Justices where Putative Father resident in Scotland—Bastardy Laws Amendment Act* 1872 (35 & 36 *Vict. c.* 65)—*Summary Jurisdiction (Process) Act* 1881 (44 & 45 *Vict. c.* 24) *ss.* 4, 6.] The Summary Jurisdiction (Process) Act 1881 (44 & 45 Vict. c. 24) does not enable a bastardy summons to be issued by justices in England and served in Scotland upon the putative father domiciled and resident in Scotland; and if a summons is so served and the putative father does not appear before the justices they have no jurisdiction to make a bastardy order against him.—So *held* affirming the decision of the Court of Appeal. BERKLEY *v.* THOMPSON - 45

BILL OF LADING—Indorsement—Passing of property - - - - 74
See SHIP. 3.

BOARD OF TRADE—Discretionary power—Railway company - - - 579
See SCOTCH LAW. 8.

BOND OF CORROBORATION - - 119
See SCOTCH LAW. 2.

BONUS—Capital or income - - - 438
See INCOME TAX.

BORROWING POWERS—Corporation - 354
See CORPORATION.

BRIDGE—Removal of broken bridge—Railway company - - - - 579
See SCOTCH LAW. 4.

BRITISH SUBJECT—Settlers in Colony—Privileges of English Law - - 692
See SCOTCH LAW. 6.

BROKER—Advances by - - - 617
See FACTOR.

BUILDING—General line of building - 229
See METROPOLIS MANAGEMENT ACT.

BUILDING SCHEME—Easement - - 590
See LIGHT.

BUILDING SOCIETY—*Withdrawal of Members—Construction of Rule "provided the funds permit"—Winding-up—Priorities in Winding-up.*] The rules of a benefit building society allowed any investing member to withdraw "provided the funds permit," upon giving notice; and declared that no further liabilities shall be incurred by the society till such member has been repaid." The society was ordered to be wound up and the assets were insufficient to pay everybody:—*Held*, affirming the decision of the Court of Appeal, that those investing members who had given notice of withdrawal and whose notices had expired before the winding-up began, were entitled to be paid out of the assets (after the outside creditors) in priority to those members who had not given notice of withdrawal, notwithstanding the fact that between the giving of the notices and the winding-up there never were any funds for payment. WALTON *v.* EDGE - 33

—— Scotch law - - - - 119
See SCOTCH LAW. 2. 3

CANADA, LAW OF—*Quebec—Duty upon Exhibits—British North America Act*, 1867, *ss.* 65, 92, *subss.* 2, 14—*Quebec Act*, 43 & 44 *Vict. c.* 9—*Powers of Provincial Legislature.*] *Held*, that Quebec Act (43 & 44 Vict. c. 9) which imposed a duty of ten cents upon every exhibit filed in Court in any action depending therein is ultrà vires of the provincial legislature. Attorney-General for Quebec *v.* Reed - - - - **141**

2. —— *Quebec—Mortgagor and Mortgagee—Notice—Right of Intervention—Sect.* 154 *of Civil Procedure Code.*] Where a registered deed referred to and by reference incorporated certain other transfers and agreements whereby it appeared that the deed, though professedly one of sale, was in substance and reality the transfer to the ostensible purchaser of an estate which had been specifically allotted to him as part of his share of the residue under his father's will; *held* that a mortgagee from the said purchaser must be treated as having full knowledge that the property was by the will grevé de substitutions in favour of the mortgagor's wife and family, his usufruct being not arrestable for his debts, especially as the mortgagee's agent was personally cognizant of the transfers and agreements of which the deed gave notice.—Certain rents and dividends of the said mortgagor having been attached, *held* that under sect. 154 of the Civil Procedure Code those who were only entitled under the will to the corpus of the property and the shares had no right to intervene in a proceeding between the mortgagor and mortgagee to declare such rents and dividends insaisissables during the mortgagor's life. Carter *v.* Molson. Holmes *v.* Carter - - - - **664**

3. —— *Power to apportion amongst a Class includes Power of Exclusion—Illusory Appointments—Will—Construction.*] Where a testator domiciled in Lower Canada bequeathed a portion of his residuary estate to his executors upon trust to "pay upon the death of his son, the capital thereof to such son's children in such proportion as my said son shall decide by his last will and testament, but in default of such decision then share and share alike as their absolute property for ever":—*Held*, that the son had not only the right to apportion the capital between all his children, as well those of his then existing marriage as those of any future marriage, but also the right to dispose of the property in favour of one or more of his children to the exclusion of the others.—The English doctrine as to illusory and unsubstantial appointments under a power is not and never was any part of the old French law or of the law of Lower Canada.—An English will by a testator domiciled in Lower Canada must be interpreted with regard to the law of Lower Canada, and not that of England.—*Martin* v. *Lee* (14 Moore, P. C. 142) explained. McGibbon *v.* Abbott - - - - - **653**

4. —— *Quebec—Sheriff's Sale of an Immeuble—Duty of Vendor to give Possession—Rights of Purchaser.*] A sheriff's sale of a sugar factory with the fixed machinery therein, as of an immeuble, having taken place on the distinct footing that the property was sold free of all charges, the customs authorities on the next day, acting under a bref d'assistance, seized the whole machinery and refused to give or allow delivery until the whole export duties chargeable in respect of the machinery were paid:—*Held*, that whether the claim of the Crown was well founded or not, the seizing and detaining the machinery was in virtue of a warrant ex facie regular, and effectually prevented the seller from giving possession, and consequently relieved the purchaser from his obligation to pay the price.—There is nothing either in the Civil or Procedure Code of Lower Canada which casts upon such a purchaser the obligation to pay the price and thereafter get possession from a third party as he may. Sect. 712 of the C. P. L. C. relates to dispossessing the judgment debtor only. Prévost *v.* La Compagnie de Fives-Lille - - - - **643**

—— Legislative power - - - **675**
See Practice. 3.

CAPE OF GOOD HOPE, LAW OF—*Roman-Dutch Law — Prescription — User and Enjoyment of Water—Rights of the Owner of Springs—Rights of Riparian Proprietors.*] The respondent's predecessor in title in 1820 constructed a watercourse on Crown lands, by means of which he diverted the water of two springs which rose thereon, so that they mingled with the waters of a private stream admittedly belonging to the farm, of which the respondent owned a portion. He did so with the license of those who acted as agents for the Government, in order to have the permanent use of the water for his farm, and continued his user for the period of prescription, after which the respondent applied for and obtained from the Colonial Government a renewal of the license originally granted to his predecessor:—*Held*, that the user of the diverted water by the respondent's predecessor was not precarious, and that the act of the respondent had not deprived him of the prescriptive right acquired by his predecessor so as to enable the Crown to give to the plaintiffs in 1881 a title to the said water.—It is very doubtful whether by Dutch-Roman law, the owner of the sources of streams has exclusive dominion over their waters. They are at least subject to rights of user acquired by prescription, and probably also to the rights which English law recognises in riparian proprietors to water flowing in a known or definite channel.—*Miner* v. *Gilmour* (12 Moore, 131) and *Van Breda* v. *Silberbauer* (Law Rep. 3 P. C. 84) approved.—When a prescriptive right is once acquired, it cannot be lost by any subsequent act not amounting to a surrender, even though such act would have, previous to the acquisition of such right, rendered the user precarious. Commissioners of French Hoek *v.* Hugo - - - **336**

CARGO—Expenses of re-shipping - - **404**
See Ship. 1.

CASES—*Aberdeen, Magistrates of* v. *More* (1813. Hume's Dec. 502), considered - **692**
See Scotch Law. 6.

—— *Ashbury Company* v. *Riche* (Law Rep. 7 H. L. 653) - - - **354**
See Corporation.

—— *Attwood* v. *Sellar* (5 Q. B. D. 286) discussed
See Ship. 1. [**404**

CASES—*continued.*

—— *Cassels* v. *Lamb* (12 Court Sess. Cas. 4th Series, 722) affirmed - - 553
See Scotch Law. 10.

—— *Dysart Case* (6 App. Cas. 507) followed 763
See Scotch Law. 7.

—— *Emperor* v. *Rolfe* (1 Ves. Sen. 208) - 422
See Settlement. 2.

—— *Enohin* v. *Wylie* (10 H. L. C. 13) dissented from - - - - - 453
See Scotch Law. 1.

—— *Franconia, The* (2 P. D. 163) overruled 59
See Practice. 1.

—— *Geils* v. *Geils* (1855. 17 Court Sess. Cas. 2nd Series, 397) considered - - 692
See Scotch Law. 6.

—— *Macdonald* v. *Union Bank* (1864. 2 Court Sess. Cas. 3rd Series, 963) considered
See Scotch Law. 6. [692

—— *Madeline Smith* (1857. 2 Irving's Justiciary Rep. 653) considered - - 692
See Scotch Law. 6.

—— *Martin* v. *Lee* (14 Moore P. C. 142) explained - - - - - 653
See Canada, Law of. 3.

—— *Miner* v. *Gilmour* (12 Moore's Ind. Ap. Ca. 131) - - - - - - 336
See Cape of Good Hope, Law of.

—— *New Zealand and Australian Land Company* v. *Watson* (7 Q. B. D. 374) explained - - - - - 617
See Factor.

—— *Preston* v. *Melvill* (2 Rob. App. 107) explained - - - - - 453
See Scotch Law. 1.

—— *Simpson* v. *Smith* (Law Rep 6 C. P. 87) overruled - - - - - 229
See Metropolis Management Acts.

—— *Van Breda* v. *Silberbauer* (Law Rep. 3 P. C. 84) approved - - - 336
See Cape of Good Hope, Law of.

—— *Whitworth* v. *Hall* (2 B. & Ad. 695) approved - - - - - 210
See Champerty.

—— *Wilkinson* v. *Anglo-Californian Gold Mining Company* (18 Q. B. (N.S.) 728) distinguished - - - - - 293
See Deed.

CERTIFICATE — Architect — General line of building - - - - - 229
See Metropolis Management Acts.

CHAMPERTY—*Practice—Dismissing Action as frivolous and vexatious — Abuse of Process of Court—Order xxv., r. 4—Action for maliciously procuring Bankruptcy — Maintenance — Bankruptcy Act,* 1869*—Cause of Action passing to Trustee in Bankruptcy—Company in Liquidation —Corporation.*] A bankrupt whose adjudication in bankruptcy has not been set aside cannot maintain an action for maliciously procuring the bankruptcy; and such an action may be summarily dismissed upon summons as frivolous and vexatious—*Whitworth* v. *Hall* (2 B. & Ad. 695) approved—A bankrupt cannot maintain an action for maintenance on the ground that the defendant incited and supported bankruptcy proceedings in which he had no common interest, since the cause of action (if any) passed to the trustee in bankruptcy; and such an action may be summarily dismissed upon summons as frivolous and vexatious:—*Held* also, by the Earl of Selborne L.C., that a corporation in liquidation, as distinct from the individual liquidator, is incapable of commiting such an act of maintenance. —The inherent jurisdiction of the Court to protect itself from abuse is recognised and extended by Order xxv., rule 4, of the Judicature Rules of 1883. Metropolitan Bank *v.* Pooley - 210

CIVIL PROCEDURE CODE OF LOWER CANADA, s. 712 - - - - - 643
See Canada, Law of. 4.

COAL—Liberty of working—Reservation in conveyance—Scotch Law - - 813
See Scotch Law. 5.

COLLISION—Ship—Negligence - - 276
See Ship. 4.

COLONIAL LAW—Lower Canada 141, 643, 653,
See Canada, Law of. 1, 2, 3, 4. [664

—— Cape of Good Hope - - - 336
See Cape of Good Hope, Law of.

—— New South Wales - - 279, 282
See New South Wales, Law of. 1, 2.

—— Trinidad - - - - - - 312
See Trinidad, Law of.

—— Victoria - - - - - 300
See Victoria, Law of.

COLONIAL LEGISLATURE—Power of - 282
See New South Wales, Law of. 2.

COLONY—English settlers—Privileges of English law - - - - - 692
See Scotch Law. 6.

COMMISSIONERS—Endowed Schools Act 304
See Endowed Schools Act.

COMMON LAW PROCEDURE ACT—Victoria 300
See Victoria, Law of.

COMPANY—Bonus—Capital or income - 438
See Income Tax.

COMPOSITION—Tithe rent-charge—Statute of Limitations - - - - - 14
See Limitations, Statute of.

CONTRACT—Privity of - - - 617
See Factor.

CONTRIBUTION—Ship—General average 107
See Ship. 2.

CORPORATION — *Borrowing Powers — Ultrà vires.*] The respondents were constituted a company by an Act of Geo. 2, for the purpose of recovering and preserving the navigation of the River Dee. This Act was amended by subsequent Acts, but none of them expressly authorized or forbade the company to borrow, till the Act 14 & 15 Vict. c. lxxxvii., which, by sect. 24, empowered the company to borrow at interest for the purposes of their Acts upon bond or mortgage of the lands recovered and inclosed by them, or partly upon bond and partly upon such mortgage, a sum not exceeding £25,000, and also a further sum, not exceeding £25,000, upon mortgage of their tolls, rates and duties:—*Held*, affirming the decision of the Court of Appeal, that whether the

CORPORATION—*continued.*
earlier Acts gave an implied power to borrow or not, the company was prohibited by the 14 & 15 Vict. c. lxxxii. from borrowing except in accordance with the provisions of that Act.—By Lord Blackburn:—The law laid down by the House of Lords in *Ashbury Company* v. *Riche* (Law Rep. 7 H. L. 653) applies to all companies created by any statute for a particular purpose, and not only to companies created under the Companies Act 1862 (25 & 26 Vict. c. 89). Baroness Wenlock *v.* River Dee Company 354
—— Maintenance of suit - - - 210
See Champerty.
COSTS—Law of Victoria - - - 300
See Victoria, Law of.
COVENANT—To settle after-acquired property 1.
See Settlement. 1.
CRIMINAL CASE—Appeal to Privy Council 675
See Practice. 3.
CUSTOMS REGULATION ACT, 1879 - 282
See New South Wales, Law of. 2.

DANUBE—Navigation of—Collision - 276
See Ship. 4.
DEED—*Execution of Deed of Assignment—Effect of Note appended to Signature.*] Not every attempt by a form of execution to restrain the full operation of a deed can be treated as a non-execution of it. Where a deed of assignment by debtors to a trustee for the benefit of all creditors who should execute the deed was executed by the plaintiffs, who appended a note that they executed only in respect of certain claims scheduled to the deed and amounting to $73,531, and it appeared that subsequently thereto they received a sum of money from the trustee by virtue of their execution of the deed:—*Held*, that the plaintiffs were bound. The note did not amount to a refusal to execute; and the plaintiffs having received payment under the deed could not be heard to repudiate it, and deny their execution.—*Wilkinson* v. *Anglo-Californian Gold Mining Company* (18 Q. B. (N.S.) 728) held to be inapplicable. Exchange Bank of Yarmouth *v.* Blethen 293
DIVORCE—Scotch law - - - 171
See Scotch Law. 4.
DOMICIL—Change of—General rules - 692
See Scotch Law. 6.

EASEMENT - - - - - 590
See Light.
ENDOWED SCHOOLS ACT—32 & 33 *Vict. c.* 56, *ss.* 9, 19, *sub-s.* 2—36 & 37 *Vict. c.* 87, *s.* 7—*Denominational School—Powers of Commissioners—Original Subscribers—Effect of Regulations.*] Where the Commissioners by their scheme provided that certain endowments which had theretofore been applied in carrying on the schools of a particular parish, should thenceforth be applied in exhibitions for the benefit of a larger area of schools; *held*, that this was within their powers under sect. 9 of the Act of 1869, and that being so, the way in which those powers had been exercised was not the proper subject of appeal:—*Held*, that a charity which has no instrument of foundation, or statutes, or duly
ENDOWED SCHOOLS ACT—*continued.*
authorized regulations impressing upon it a denominational character, does not fall within the 19th clause of the Act of 1869, or the 7th clause of the Act of 1873. Its trustees cannot impress upon it that character, nor is any practice for the the time being as to the application of its funds, sufficient evidence of there ever having been regulations in existence which prescribed it.—Where a charity is established by subscriptions, the original subscribers alone are the founders, the later benefactions are on the footing of the original foundation. If its regulations are relied upon as impressing upon it a denominational character, they must be shewn to have been authorized by all the founders, and to have been issued before fifty years from their deaths. *In re* St. Leonard, Shoreditch, Parochial Schools [304
ESTOPPEL — Patentee — Denying validity of patent - - - - 249
See Patent.
EVIDENCE—Family repute—Hearsay evidence
See Scotch Law. 7. [763
—— Proof of marriage—Scotch law - 692
See Scotch Law. 6.
—— Register in church—Memorandum by rector
See Scotch Law. 6. [692
—— Statments post litem motam - - 763
See Scotch Law. 7.
EXECUTION—Action against partner in name of firm - - - - - 680
See Practice. 4.
EXECUTOR—Deed—Qualified execution - 293
See Deed.

EXHIBITS—Duty on—Law of Quebec - 141
See Canada, Law of. 1.

FACTOR — *Principal and Agent—Advances by Brokers to Agents for Sale—Antecedent Debt—Privity of Contract—Money had and received—Factors Act, 5 & 6 Vict. c.* 39, *ss.* 3, 7.] The appellants, merchants at Singapore, employed M. in London as agent to sell, without authority to pledge, cargoes which they from time to time consigned to him. M. employed the respondents, London brokers, to sell the appellants' consignments, and also in speculative purchases on his own account. The respondents purchased shellac for M. without disclosing that they were buying as agents, and therefore were personally liable to the vendors on the contracts. Subsequently they made advances to M. to enable him to pay deposits on the shellac, and took as security bills of lading of some of the appellants' cargoes. They had no notice that M. was acting improperly in pledging the cargoes. On obtaining the advances M. gave the respondents cheques for the amount of the deposits, which were then paid by the respondents:—*Held*, affirming in this respect the decision of the Court of Appeal, that the obligation under which M. lay to the respondents to pay the deposits and thus prevent their being called upon to pay them, did not constitute an antecedent debt within the meaning of the Factors Act, 5 & 6 Vict. c. 39, s. 3, and that the pledges were made in respect of bonâ fide advances and

FACTOR—*continued.*
not of antecedent debts, and were valid against the appellants.—M. also pledged with the respondents pepper consigned to him for sale by the appellants, to secure an advance protected by the Factors Acts. The goods had been sold for M. by the respondents, but not delivered to the purchasers, nor paid for, when M. died insolvent and heavily indebted to the respondents on a general account. After the sale but before receiving the proceeds the respondents had notice that the appellants claimed the pepper and the proceeds:—*Held*, reversing in this respect the decision of the Court of Appeal, that after repayment of the respondents' advance the surplus proceeds of sale belonged to the appellants; that the appellants could sue the respondents for such surplus, whether on the ground of privity of contract, or on the ground of property, or under the Factors Act, 5 & 6 Vict. c. 39, s. 7.— *New Zealand and Australian Land Company* v. *Watson* (7 Q. B. D. 374) distinguished and explained. Kaltenbach *v.* Lewis - - - - - 617

FEU CONTRACT—Railway—Scotch law - 147
See Scotch Law. 9.

FEU DUTY—Failure to pay - - 553
See Scotch Law. 10.

FIXTURES — Law of Lower Canada—Sale of fixed machinery - - - 643
See Canada, Law of. 4.

FORFEITURE—Defaulting vassal—Scotch law
See Scotch Law. 10. [553

GENERAL AVERAGE - - 107, 404
See Ship. 1, 2.

GENERAL LINE OF BUILDINGS - - 229
See Metropolis Management Act.

HEARSAY EVIDENCE—Family repute - 763
See Scotch Law. 7.

HIGHWAY—Scotch law - - - 378
See Scotch Law. 3.

HUSBAND AND WIFE—Evidence of marriage—Scotch law - - - 692
See Scotch Law. 6.

—— Nullity of marriage — Impotency — Scotch law - - - - - 171
See Scotch Law. 4.

ILLUSORY APPOINTMENT — Law of Lower Canada - - - - 653
See Canada, Law of. 3.

IMPLICATION—Grant of easement - 590
See Light.

IMPOTENCE—Nullity of marriage—Scotch law
See Scotch Law. 4. [171

INCOME TAX—*Revenue, Inland—Insurance Company, Life — Bonuses to participating Policyholders—"Annual Profits or Gains"—Dividend —5 & 6 Vict. c.* 35, *s.* 54.] A life insurance company issued "participating policies" at an increased premium, according to the terms of which at the end of each quinquennial period "the gross profits" of such policies were thus dealt with: two-thirds were returned by way of bonus or abatement of premiums to the holders of such policies then in force: the remaining

INCOME TAX—*continued.*
third went to the company who bore the whole expenses of the business, the portion remaining after payment of expenses constituting the only profit available for division among the shareholders:—*Held*, reversing the decision of the Court of Appeal, by Lords Blackburn and Fitz-Gerald, Lord Bramwell dissenting, that the two-thirds returned to the policy-holders were "annual profits or gains" and assessable to income tax. Last *v.* London Assurance Corporation 438

INDORSEMENT — Bill of lading — Passing of property - - - - - 74
See Ship. 3.

INHERITANCE—Law of Trinidad - 312
See Trinidad. Law of.

INSURABLE INTEREST—Marine insurance
See Insurance, Marine.

INSURANCE, MARINE — *Insurable Interest in Goods at Purchaser's Risk—Sale of Goods "f. o. b."*] D. sold to B. 200 tons of German sugar "f. o. b. Hamburg; payment by cash in London in exchange for bill of lading;" the price to be variable according to the percentage of saccharine matter which was not to exceed or fall short of certain limits. B. resold to the respondent the same quantity at an increased price, but otherwise upon similar terms. D. also sold to the respondent 200 tons upon similar terms. To fulfil these contracts 390 tons (being ten tons short) were shipped in bags on one vessel at Hamburg for Bristol, no bags being set apart for one contract more than the other. Each bag was marked with its percentage of saccharine matter, and bills of lading with marks corresponding to the bags were sent to D. to be retained till payment in accordance with the contracts. The respondent was insured in floating policies upon "any kind of goods and merchandises" between Hamburg and Bristol, and duly declared in respect of this cargo. The ship sailed from Hamburg for Bristol and was lost. After receiving news of the loss, D. allocated 2000 bags or 200 tons to B.'s contract, and 1900 bags or 190 tons to the other contract. In an action upon the policies:—*Held*, affirming the decision of the Court of Appeal, that the sales being "f. o. b. Hamburg" the sugar was at the respondent's risk after shipment; that he had an insurable interest in it; and that the underwriters were liable. Inglis *v.* Stock - - 263

IRISH TITHE RENT-CHARGE—Statute of Limitations - - - - 14
See Limitations, Statute of.

IRRITANT CLAUSE - - - 553
See Scotch Law. 10.

JUDGMENT—Action against partner in name of firm - - - - - 680
See Practice. 4.

JURISDICTION—Admiralty Division—Action in rem—Lord Campbell's Act - 59
See Practice. 1.

—— Scotch Courts—Assets in England and Scotland - - - - 453
See Scotch Law. 1.

LEGITIMACY—Law of Trinidad - - 312
See Trinidad, Law of.

LEGITIMACY—*continued.*
—— Scotch law—Subsequent marriage - 692
See Scotch Law. 6.

LIFE INSURANCE COMPANY - - 438
See Income Tax.

LIGHT — *Easement — Implied Reservation by Grantor—Notice—Building Scheme—Merger of Lease—Surrender.*] By seven simultaneous leases seven plots of land marked respectively A, B, C, D, E, F, and G, and forming together one square block, were demised by the owner to J. with a ground plan on each lease, and with covenants for the erection and maintenance of buildings upon each plot according to certain plans. The leases were granted with a view to the erection upon the whole block of one large edifice, of which the several parts and the internal arrangements were to be connected together for a common use and occupation; so however as to be separable (if desired) into seven separate buildings. J. being in the occupation of the whole, while the buildings were being erected mortgaged C, F, and G, by a sub-lease which recited the building scheme and the original leases of C, F, and G, and contained stipulations for the completion of the buildings on C, F, and G. After the buildings had been substantially completed J. mortgaged E by a deed which recited the lease of E and assigned the buildings thereon, subject to the covenants in the lease, to one who had notice of the general plan of the buildings. J. then mortgaged B. On J.'s bankruptcy the several mortgagees obtained foreclosure decrees in respect of B, C, and E. respectively:—*Held*, reversing the decision of the Court of Appeal and restoring the decision of Bacon, V.-C., Lord Blackburn dissenting, that though there was no express reservation of the right to light, yet looking at the plans, the covenants in the original leases, and the mortgage deeds, the mortgagees of C and E respectively were by reasonable implication precluded from interfering with the light to the windows in B which looked out upon C and E respectively, and might be restrained accordingly in an action by the mortgagee of B:—*Held*, also, that the mortgagee of B could maintain such an action, although he had surrendered the lease of B and taken a fresh lease from the original lessor; for—without deciding what effect the merger of the original lease might have—whenever the lease of B came to an end either by surrender, forfeiture, or otherwise, the original lessor would have the same rights to light as the mortgagee would have had if the original lease had subsisted.—*Semble*, by the Earl of Selborne, that if on a sale and conveyance of land adjoining a house to be built by the vendor, it is mutually agreed that one of the outer walls of that house may stand wholly or partly within the verge of the land sold and shall have it in particular windows opening upon and overlooking the land sold, and if the house is erected accordingly, the purchaser cannot afterwards build upon the land sold so as to prevent or obstruct the access of light to those windows. Russell *v.* Watts. - - 590

LIMITATIONS, STATUTE OF—*Tithe Rent-charge in Ireland—Non-payment for more than Twenty Years—Statute of Limitations (3 & 4 Wm. 4 c. 27) ss. 1, 2, 29—1 & 2 Vict. c. 109.*] The right to tithe rent-charge in Ireland was vested in a spiritual corporation sole until 1871, when it was transferred by statute to a lay corporation. In 1877 the lay corporation brought an action against the persons liable to pay tithe rent-charge to recover six years' arrears. For more than twenty years next before action there had been no payment and no acknowledgment in writing:—*Held*, affirming the decision of the Irish Court of Appeal, that tithe rent-charge was "rent" within sect. 1 of the Statute of Limitations (3 & 4 Wm. 4, c. 27) and not a "composition" within the exception to sect. 1, compositions in Ireland having been abolished by 1 & 2 Vict. c. 109: that sect. 2 of 3 & 4 Wm. 4 c. 27 applied as between the owner and the person liable to tithe rent-charge; that the lay corporation could not avail themselves of the provisions of sect. 29 in favour of spiritual corporations sole; and that the action was barred by the lapse of twenty years. Commissioners of Church Temporalities in Ireland *v.* Grant 14

LOCAL GOVERNMENT ACTS—*Streets—Paving Expenses—Liability of adjoining Owners—Road made good and afterwards paved and flagged—Towns Improvement Clauses Act* 1847 (10 & 11 *Vict. c.* 34) *s.* 53.] In 1857 a local Act was passed which incorporated sect. 53 of the Towns Improvement Clauses Act 1847 (10 & 11 Vict. c. 34). In 1874 the appellants, in their capacity as the corporation of P., bought some land of the respondents abutting upon a country high road within the district to which the local Act applied, and, in pursuance of an agreement then made with the respondents, at their own expense widened and improved the road and laid out a footpath along the side, and gravelled, channelled, and kerbed the footpath. In 1879 the appellants, in their capacity as the urban authority, paved and flagged the footpath and sought to recover the expense of so doing from the respondents as adjoining owners under the powers of sect. 53. The jury found that before the paving and flagging in 1879 the road was not a street in the popular sense of the term, and that the footpath had been "made good" within sect. 53:—*Held*, affirming the decision of the Court of Appeal, that the respondents were not liable, upon the ground that the footpath had been "theretofore made good" within the meaning of sect. 53, but without deciding whether the road was a "street" within the meaning of that section.—The word "theretofore" in sect. 53 refers to the period before the work is done by the commissioners, not to the period before the passing of the special Act. Mayor, &c., of Portsmouth *v.* Smith - - - - 364

LORD CAMPBELL'S ACT—Ship—Jurisdiction of Admiralty Division - - 59
See Practice. 1.

MAINTENANCE OF SUIT - - - 210
See Champerty.

MAXIM OF LAW—Omnia præsumuntur rite acta - - - - - 692
See Scotch Law. 6.

MERGER—Lease—Easement - - 590
See Light.

METROPOLIS MANAGEMENT ACT—*Building—Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102) *s.* 75—"*General line of build-*

METROPOLIS MANAGEMENT ACT—*continued.*
ings"—Certificate of Superintending Architect conclusive.] The certificate of the superintending architect of the Metropolitan Board of Works made under the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102) s. 75 and fixing the "general line of buildings" in a road is conclusive as to a building erected before the certificate is made; and on the hearing of a summons (issued after the making of the certificate) for an offence under sect. 75 alleged to have been committed in respect of such building the justice has no jurisdiction to review the architect's decision or decide for himself whether the line fixed by the certificate is the true general line.—So *held*, affirming the decision of the Court of Appeal.—*Simpson* v. *Smith* (Law Rep. 6 C. P. 87) overruled. Spackman *v.* Plumstead District Board of Works - - - - - 229

MINE—Reservation of liberty of working coal—Scotch law - - - 813
See Scotch Law. 5.

MISTAKE—*Construction—Memorandum of Agreement—"His share" equivalent to Share of Firm.*] Case in which it was held, that according to the true construction, having regard to all the circumstances of the case, of a memorandum of mutual agreement between M., the plaintiffs, and three other firms, whereby M. agreed to surrender to the plaintiffs "his share" in a certain mortgage held by him as trustee, the share of M.'s firm therein passed, and not merely his own individual share as between himself and his partner. Marshall *v.* Maclure - - - - 325

MORTGAGE—Law of Lower Canada - 664
See Canada, Law of. 2.

NAVIGATION—Collision - - - 276
See Ship. 4.

NEW SOUTH WALES, LAW OF—*Powers of New South Wales Legislature—*11 *Vict. No.* 13, *s.* 1—*Costs of Action of Slander.*] *Held*, that the legislature of New South Wales had power to repeal the Statute of James (21 Jac. 1, c. 16), s. 6, and had impliedly done so by 11 Vict. No. 13, s. 1, which, according to its true construction, placed an action for words spoken upon the same footing as regards costs and other matters as an action for written slander. Harris *v.* Davies - 279

2. —— *Powers of Legislature—Customs Regulation Act of* 1879, *s.* 133—*Duties levied under an Order in Council.*] A Colonial Legislature is not a delegate of the Imperial Legislature. It is restricted in the area of its powers, but within that area it is unrestricted.—*Held*, that the Customs Regulation Act of 1879, s. 133, was within the plenary powers of legislation conferred upon the New South Wales Legislature by the Constitution Act (scheduled to 18 & 19 Vict. c. 54), ss. 1 and 45.—*Held*, further, that duties levied by an Order in Council issued under sect. 133, are really levied by authority of the Legislature and not of the Executive. Also that under sect. 133 "the opinion of the collector," whether right or wrong, authorizes the action of the Governor. Powell *v.* Apollo Candle Company - - 282

NON-USER—Highway—Scotch law - 378
See Scotch Law. 3.

NULLITY OF MARRIAGE—Scotch law - 171
See Scotch Law. 4.

ORDER IN COUNCIL—Duties levied by - 282
See New South Wales, Law of. 2.

PARTICULARS OF OBJECTIONS—Patent 249
See Patent.

PARTNERSHIP—Action against partner in name of firm—Judgment - - 680
See Practice. 4.
—— Patent—Denying validity of patent—Estoppel - - - - 249
See Patent.

PATENT—*Letters Patent—Estoppel—Particulars of Objection delivered by one of Two Partners in Action against both—*15 *&* 16 *Vict. c.* 83 *s.* 41.] If a patentee becomes bankrupt, and his trustee in bankruptcy assigns the patent the patentee is not estopped from afterwards denying the validity of the patent, as against the assignee.—So *held*, affirming the decision of the Court of Appeal.—A patentee having gone into liquidation his trustee in liquidation assigned the patent. The patentee afterwards went into a trade partnership with S. The assignees of the patent brought an action against the patentee and S. for an injunction and damages for infringements of the patent alleged to have been committed in partnership. The defence alleged the invalidity of the patent, and the defendants delivered particulars of objections, viz., that the defendants would deny the infringement, and that the defendant S. would rely on their objections to the validity of the letters patent on the ground of want of novelty and insufficiency of the specification:—*Held*, reversing the decision of the Court of Appeal, that under 15 & 16 Vict. c. 83 s. 41 it was not necessary for every one of two or more defendants defending in the same interest to deliver particulars of objections, and that the patentee was not precluded from setting up at the trial the invalidity of the patent on the ground of want of novelty and insufficiency of the specification. Smith *v.* Cropper - - 249

PAVING EXPENSES—Street - - 364
See Local Government Acts.

PEERAGE - - - - 692, 763
See Scotch Law. 6, 7.

PLEDGE—Bill of lading—Indorsement - 74
See Ship. 3.

POWER—Law of Lower Canada—Illusory appointment - - - - 653
See Canada, Law of. 3.
—— To borrow—Corporation - - 354
See Corporation.

PRACTICE — *Admiralty Division—Jurisdiction—Action in rem—Action under Lord Campbell's Act—*9 *&* 10 *Vict. c.* 93—*Admiralty Court Act* 1861 (24 *Vict. c.* 10) *ss.* 7, 35.] The Admiralty Court Act 1861 (24 Vict. c. 10) which by sect. 7 gave the Court of Admiralty "jurisdiction over any claim for damage done by any ship," did not give jurisdiction over claims for damages for loss of life under Lord Campbell's Act (9 & 10 Vict. c. 93); and the Admiralty Division cannot entertain an action in rem for damages for loss of life under Lord Campbell's Act:—So *held* affirming

PRACTICE—*continued.*
the decision of the Court of Appeal.—*The Franconia* (2 P. D. 163) overruled. Seward *v.* "Vera Cruz" - - - - - - - 59

2. —— *Appeal—Bankruptcy of Appellant.*] Where an appeal involves a question of the appellant's status, the House will allow it to be proceeded with notwithstanding the bankruptcy of the appellant. G. *v.* M. - - - - 171

3. —— *Leave to appeal in Criminal Cases—Validity of* 43 *Vict. c.* 25 (*Canada*).] The rule of the Judicial Committee is not to grant leave to appeal in criminal cases except where some clear departure from the requirements of justice is alleged to have taken place.—*Held*, that 34 & 35 Vict. c. 28, which authorizes the Parliament of Canada to provide for "the administration, peace, order, and good government of any territory not for the time being included in any province" vests in that Parliament the utmost discretion of enactment for the attainment of those objects. Accordingly Canadian Act 43 Vict. c. 25, is intrà vires the legislature.—Sect. 76, sub-sect. 7, which prescribes that full notes of evidence be taken is literally complied with when those notes are taken in shorthand. Riel *v.* The Queen 675

4. —— *Parties—Action against Partner in Name of Firm—Appearance by one Partner only—Judgment by consent against Partner appearing instead of against Firm—Application to issue Execution against the other Partner—Amendment of Judgment—Order* XII. *r.* 12, *Order* XLII. *r.* 8, *Order* LIX. *r.* 2, *of the Rules in force before* 1883.] To a writ issued against R. & Co., and claiming damages for libel, an appearance was entered for "R. trading as R. & Co. the defendant in this action." The statement of claim was delivered against "R. sued as R. & Co." and the proceedings continued in that form down to judgment. At the trial by consent a verdict was found for the plaintiff for 40*s.* and judgment entered accordingly. After issuing execution against R. the plaintiff, under the Rules in force before 1883, took out a summons for liberty to amend the judgment (and the pleadings if necessary) by striking the words "R. sued as" from the title of the action; to enter judgment against R. & Co. so as to correspond with the writ, and to issue execution against C., on the ground that C. had been since discovered to be a partner in the firm: —*Held*, affirming the decision of the Court of Appeal, that the proceedings having been conducted against R. only, and judgment having been signed by consent against him alone, the judgment could not be converted into a judgment against the firm. Munster *v.* Cox - - - 680

PRESCRIPTION—Scotch law - - 378
See Scotch Law. 3.

—— Use of water - - - - 336
See Cape of Good Hope, Law of.

PRINCIPAL AND AGENT—Factors Act - 617
See Factor.

PRIVITY OF CONTRACT - - - 617
See Factor.

PRIVY COUNCIL—Practice—Appeal in criminal cases - - - - - 675
See Practice. 3.

PROPERTY—Passing of—Bill of lading - 74
See Ship. 3.

PROVISIONAL LEGISLATURE—Powers of 141
See Canada, Law of. 1.

QUEBEC, LAW OF - - 141, 643, 653, 664
See Canada, Law of. 1, 2, 3, 4.

RAILWAY COMPANY—Scotch law 147, 579
See Scotch Law. 9, 10.

REGISTER—Marriage—Memorandum made by rector—Evidence - - - 692
See Scotch Law. 6.

RESERVATION OF MINERALS—Scotch Law
See Scotch Law. 5. [813

REVENUE—Canadian law—Duty on exhibits
See Canada, Law of. 1. [141

—— Income tax - - - - 438
See Income Tax.

RIPARIAN OWNER — Prescription — Roman-Dutch law - - - - 336
See Cape of Good Hope, Law of.

ROMAN-DUTCH LAW - - - 336
See Cape of Good Hope, Law of.

RULES OF BUILDING SOCIETY—Application to wind up - - - - 33
See Building Society.

RULES OF SUPREME COURT, 1875, Order XII., r. 12 - - - - - 680
See Practice. 4.

—— **Order XLII., r. 8** - - - 680
See Practice. 4.

—— **Order LIX., r. 2** - - - - 680
See Practice. 4.

RULES OF SUPREME COURT, 1883, Order XXV., r. 4 - - - - - 210
See Champerty.

SCHOOL—Endowed school - - - 304
See Endowed Schools Act.

SCOTCH COURTS—Assets in England and Scotland - - - - - - 453
See Scotch Law. 1.

SCOTCH LAW—*Administration—Estate of domiciled Scotch Testator—Jurisdiction, Conflict of—Trust Funds partly in Scotland partly in England—Power of Scotch Courts to sequestrate Estate and appoint Judicial Factor—Forum conveniens—Confirmation and Probate Act* (21 & 22 *Vict. c.* 56), *s.* 12—*Treaty of Union*, 1706 (6 *Anne*, *c.* 11), *art.* 19.] A resident and domiciled Scotchman died leaving a trust disposition and settlement appointing six trustees; three were resident in Scotland, one being a Scotch member of parliament resided in Scotland when parliament was not sitting, and the other two were resident in England. The truster had a very large amount of personalty in Scotland as well as heritable estate; and a trifling amount of personal estate only in England. The trustees proved the trust deed in Scotland, and were confirmed as executors. They then had the Scotch probate sealed in accordance with 21 & 22 Vict. c. 56, s. 12, and thus became the personal representatives in England. They removed all but a small portion of the personalty in England into Scotland. A person resident in

SCOTCH LAW—*continued.*

England, who was entitled to a share of a large legacy, and also to a share of the residue, brought an action in England to administer the estate. The trustees were served and entered an appearance. The plaintiff, an infant, in the English action moved for judgment for administration of the whole estate, and on the 29th of November, 1882, the Court of Appeal granted the order. The trustees lodged an appeal to this House. In June, 1883, the trustees carried certain accounts into Chambers in the English action. On the 5th of July, 1883, four of the residuary legatees commenced this action in Scotland against the trustees for, inter alia, declarator that the trustees were bound to administer the estate in Scotland, subject to the Scotch law and under the authority and jurisdiction of the Scottish Courts *alone:* and that they were not entitled to place the estate under the control of the English Court or any other foreign tribunal furth of Scotland, and for interdict; or, alternatively, to the conclusion for interdict for the removal of the trustees, for sequestration of the estate, the appointment of a judicial factor and for interdict until the estate should be vested in the judicial factor. On the 30th of November, 1883, this House affirmed the order of the Court of Appeal. On the 29th of February, 1884, the Court of Session granted an interlocutor finding in terms of the declaratory conclusions of the summons: sequestrating the estate, appointing a judicial factor and interdicting the trustees from removing any title deeds, &c. from Scotland, or accounting to any one otherwise than the judicial factor.—On appeal taken by order of the Court of Chancery in England:—*Held*, that the decerniture in terms of the declaratory conclusions of the summons, which in effect affirms the exclusive competency of the Scottish jurisdiction, was not supported by statute nor authority; and, therefore, that part of the principal interlocutor and that part of the interdict relating to accounting must be reversed; but the remaining portion of the principal interlocutor and the others appealed from must be affirmed, because the Scotch Courts had (1) full jurisdiction to sequestrate the estate in Scotland—the persons of the trustees and the trust property being there—and to appoint a judicial factor; and (2), because in the circumstances and on the undertaking given as to the infant plaintiff becoming a party to the Scotch administration, a primâ facie case of convenience in favour of a judicial administration in Scotland had been made out.—Lord Cottenham in *Preston* v. *Melville* (2 Rob. App. 107) explained, and Lord Westbury in *Enohin* v. *Wylie* (10 H. L. C. 13) dissented from. Ewing *v.* Orr Ewing - 453

2. —— *Building Society—Bond of Corroboration—Ultrà vires.*] A building society advanced in 1876 to A., a member, £1000. A. disponed in security an ex facie absolute disposition of certain subjects, which were already burdened by a prior mortgage. In 1879 A.'s estates were sequestrated, and the directors of the society, in order to prevent a sale of the subjects at an alleged loss, granted B. a bond of corroboration guaranteeing the payment of his prior mortgage.—In 1882 an order for the voluntary winding-up of the society

SCOTCH LAW—*continued.*

was made, and the liquidators instituted this action concluding for reduction of the bond of corroboration granted to B. as being ultra vires of the directors and in violation of the rules and constitution of the society:—*Held*, affirming the decision of the Court below, that the bond was ultra vires, being a transaction not authorized by the rules, and not incidental to the conduct of the society's business. Small *v.* Smith - 119

3. —— *Highway—Prescription—Non-user for a long Period—Presumption.*] According to the law of Scotland, the constitution of a public right of way does not depend upon any legal fiction, but upon the fact of user by the public as matter of right, continuously and without interruption for forty years.—And the amount of user must be such as might have been reasonably expected, if the road in dispute had been an undoubted public highway.—Also, the user must be a user of the whole road as a means of passage from one terminus to the other, and must not be such a user as can be reasonably ascribed either to private servitude rights or to the license of the proprietor.—The continued exclusion of the public from the use of an alleged public road for thirty-seven years will not, per se, destroy a pre-existent right of public way, unless it is maintained for the prescriptive period of forty years, but it is strong evidence that no such public right ever existed.—See Lord Blackburn (pp. 385-6) on the difference of English law. Mann *v.* Brodie - 378

4. —— *Husband and Wife—Nullity of Marriage—Impotence of the Man—Want of Sincerity as a Bar to the Action—Canon Law—Triennial Cohabitation.*] In a suit for nullity of marriage on the ground of impotency, there may be facts and circumstances proved, which so plainly imply on the part of the complaining spouse a recognition of the existence and validity of the marriage, as to render it most inequitable, and contrary to public policy, that he or she should be permitted to go on to challenge it with effect; but the doctrine, designated as the "doctrine of want of sincerity" in an action of this kind, has been too much extended in recent English decisions, and that doctrine, apart from "approbate" and "reprobate," has never been recognised by the law of Scotland.—Delay in raising a suit of nullity on the ground of impotency is a material element in the investigation of a case which upon the facts is doubtful; but there is no definite or absolute bar arising from it.—The Canon Law rule of triennial cohabitation has not been recognised in England beyond this point, that where a husband or a wife seek a decree of nullity propter impotentiam, if there is no more evidence than that they have for a period of three years lived together in the same house and with ordinary opportunities of intercourse, and it is clearly proved that there has been no consummation, then if that is the whole state of the evidence, inability on the part of the one or of the other will be presumed. On the other hand, the presumption to be drawn from the fact of non-consummation after three years' cohabitation is capable of being rebutted. And, also, every case need not be fortified with the presumption; for although no presumption can be raised from the absence of consummation within a

SCOTCH LAW—*continued.*

less period than three years, yet positive evidence may be given, from which the same inference of inability may be drawn. See Lord Watson's opinion (p. 198), that to this extent the Court of Session would not hesitate to adopt the rule.—G. and M. were married in 1877. They slept in the same bed for about nineteen months, but during only two months and a half of that time did G., the husband, make any attempt to consummate the marriage. He desisted on account, he alleged, of his wife's increasing coldness and repugnance to him. It was admitted that the marriage had never been consummated. In 1879 the parties finally separated, the wife living on her own income with her relations, the husband not giving anything towards her support. In 1882 the wife gave birth to a child of which G. was not the father. G. instituted an action for divorce which M. defended, and she then raised this action of declarator of nullity of marriage on the ground of G.'s impotence. G. denied his impotence. He was personally examined, and the medical evidence was that no malformation was apparent from his appearance:—*Held*, affirming the decision of the Court below, that M. was not barred personali exceptione from insisting in this action; and that G.'s impotence had been proved. G. *v.* M. 171

5. —— *Mines—Coal—Disposition of Lands with a Reservation of the "Liberty of working the Coal"—Right of Property retained.*] Where the owner conveys lands to a singular successor or other person, reserving the "liberty of working the coal" in those lands, he must be taken to have reserved the estate of coal (unless there are clear words in the deed qualifying that right of property) with which he stands vested by infeftment at the date of the conveyance. Duke of Hamilton *v.* Dunlop - - - - - 813

6. —— *Peerage—Marriage, Proof of—Certificate and Relative Affidavit—Admissible Evidence Legitimation of Children by subsequent Marriage—Marriage on Death-bed—Succession to Real Estate—Change of Domicil.*] *Held*, that Major Frederick Henry Maitland had made out his claim to the Earldom of Lauderdale and the other honours connected therewith in the Peerage of Scotland.—Where a marriage is proved to have been solemnized de facto 113 years ago by people who intended that it should be a good marriage, and it is done bonâ fide and openly, the maxim omnia rite acta præsumuntur applies.—The marriage of a domiciled Scotchman legitimates his children born previous to the marriage, and the children's right to succeed to his heritable estate is not prejudiced by the marriage taking place on death-bed.—By the law of Scotland statements of a deceased person in relation to facts, which must presumably have been within his personal knowledge, and to which, if alive, he could have been examined as a witness, may after his death be received as secondary evidence through the medium of writing, or through the medium of a living person who heard the statement. Where, therefore, a member of the family writes a note in a manuscript book to the effect that he has sent original letters to a certain person, and they cannot be found, the copies of such letters, the handwriting, and that the copies were from original letters being proved,

SCOTCH LAW—*continued.*

the note, and the copies of the letters, are evidence of the truth of the statements within the writer's personal knowledge, and appearing to be so by the letters themselves.—So also a statement, whether oral or written, is not vitiated if made with a purpose, where the object was an obvious and legitimate one and one supporting and not discrediting the presumption of truth. But the statement of a deceased person is not admissible as evidence when its terms, or the circumstances in which it was made, are such as to beget a reasonable suspicion either that the statement was not in accordance with the truth, or that it was a coloured or one-sided version of the truth; and this rule should be applied with greater strictness in criminal cases: *Magistrates of Aberdeen* v. *More* (1813. Hume's Dec. 502); *Geils* v. *Geils* (1855. 17 Court Sess. Cas. 2nd Series, 397); *Gordon* v. *Grant* (13 Ibid. 1); *Madeline Smith* (1857. 2 Irving's Justiciary Rep. 653); *Macdonald* v. *Union Bank* (1864. 2 Court Sess. Cas. 3rd Series, 963), examined.—A minute of date 1749, from an original unsigned minute book, produced from the proper custody and kept in accordance with a charter of a society, is admissible evidence.—A memorandum in a register of a church by its deceased rector made about 108 years ago, though not a contemporaneous entry made in the regular course of the register, is admissible as evidence, and goes to prove that the rector did the things stated in the memorandum.—A change of domicil must be a residence sine animo revertendi. A temporary residence for the purposes of health, travel, or business does not change the domicil. Also (1) every presumption is to be made in favour, of the original domicil; (2) no change can occur without an actual residence in a new place; and (3) no new domicil can be obtained without a clear intention of abandoning the old.—A., then ill of the malady of which he died, and two days before his death, was married in 1772 in New York to B. by C., an ordained clergyman of the Church of England, then assistant minister of Trinity Church, New York. There was produced, inter alia, in support of the marriage from the custody of the family a certificate signed by C., that he had married A. and B. according to the rites of the Church of England as by law established, and an affidavit, signed by the mayor of New York, to the effect that C. had made an oath of the truth of the statements in the certificate; a will of date anterior to the marriage, by which A. left all his property to B. and the children then born; copies of letters shewing that one of the executors wrote to his co-executor in England, a brother of A., stating that he was a witness to the ceremony of marriage; that B. signed herself in A.'s surname; that the children were recognised and taken care of by members of the family as A.'s children; and also War Office records shewing that B. received a pension as A.'s widow:—*Held*, that there was ample proof of a legal marriage.—*Per* Lord Blackburn:—When English settlers go out to a colony and settle there they carry with them, so far as may be applicable to their purpose, all the immunities and privileges of the law of England as the law of England was at that time. The Lauderdale Peerage 692

SCOTCH LAW—*continued.*

7. —— *Peerage—Evidence—Family Repute—Statements Post litem Motam.*] *Held*, that John Fraser of Carnarvonshire, mining engineer, had no right to the title, dignity, and honour of the Barony of Lovat in the Peerage of Scotland.—The general rule of the law of Scotland is that hearsay of a deceased person who, if alive, would have been a competent witness, is admissible evidence; but if the fact, to which the deceased testified, was such as he could not have had any special means of knowledge it is not receivable; and this applies to written as well as oral statements.—Deliberate statements made by deceased members of a family, who, if alive, could have been competent witnesses, are generally admissible—but a statement by one member of a family that B., another member, did a certain act, which act, if done at all, was done before the deceased narrator's birth, and there being nothing to shew what were his grounds of knowledge, and the fact not otherwise being proved, is not evidence that the particular act was done by any one; and though the statement cannot be altogether rejected, yet it can only be received as mere family tradition:—When a person leaves his native place and goes to another place to pursue a claim to an estate or title of nobility, and on his return tells certain persons what was said to him by persons connected with the family while so pursuing his inquiries; these statements are not admissible evidence.—Rule laid down in *Dysart Case* (6 App. Cas. p. 507) followed. The Lovat Peerage - - 763

8. —— *Railway—Broken Bridge in navigable River—Removal of Débris to Satisfaction of Board of Trade, Meaning of—Construction of Statute.*] The North British Railway (New Tay Bridge) Act, 1881, gave the North British Railway authority to erect a new bridge over the Tay a little higher up the river than one blown down on the 28th of December, 1879. Sect. 21 of this Act provided, "The company shall abandon and cause to be disused as a railway so much of the North British Railway as lies between the respective points of junction therewith of railway No. 1 and railway No. 2; and shall remove the ruins and débris of the old bridge, and all obstructions interfering with the navigation caused by the old bridge, to the satisfaction of the Board of Trade." The magistrates of Perth, whose jurisdiction extends down the river to within about three miles of the old bridge, raised an action for declarator and implement:—*Held*, (1) that the special Act imposed an absolute obligation to remove the whole ruins and débris of the old bridge; and sect. 21 did not give the Board of Trade a discretionary power to dispense with the performance of any part of this obligation; and it followed that the respondents had an interest to obtain a declarator as to the extent of the obligation; but (2), dissenting from the judgment of the Court below, the obligation did not become immediately prestable; and (3) the import of the expression "to the satisfaction of the Board of Trade" was, that though not bound to submit their plans of removal, including the time and manner, yet, as a matter of prudence, the company ought to do so; (4) that in the circumstances it would be inexpedient, though hardly incompetent, to do more now than

SCOTCH LAW—*continued.*

simply ordain the company to remove the whole ruins and débris in terms of sect. 21, for to order the removal "forthwith" might unduly hamper the discretion of the Board of Trade; and if the company were guilty of undue delay in applying to the Board of Trade; or if they should proceed at their own hand so as to cause obstruction to navigation; or if after obtaining the sanction of the Board of Trade to some scheme of removal, they failed to properly execute it, or any conditions attached, the respondents, on application to the Court, had an effective remedy. North British Railway Company *v.* Lord Provost of Perth - - - - - - 579

9. —— *Railway — Stoppage of all Trains—Construction of Feu Contract.*] By feu charter, dated 1863, between A., the proprietor of land through which a railway was authorized to run, and the railway company, it was provided that the company should be bound to erect on a piece of ground conveyed to them by A. at a nominal feu rent, "a station for passengers and goods travelling by the said" railway, "at which all passenger trains shall regularly stop," to be called Crathes Station.—The station was erected. Subsequently certain trains were run, namely (1) excursion trains at low fares to certain places on the line, but not to Crathes Station. They were advertised by special handbills, and were not included in the time-tables except in error. (2) Trains called the Queen's messenger trains, ran by arrangement with the Home Office, who paid the railway company a subsidy. (3) Trains called the Post Office trains, ran by arrangement with the Post Office, who also paid a subsidy. The Queen's messenger trains and the Post Office trains only ran during Her Majesty's stay at Balmoral; but they were advertised in the railway company's time-table, and through passengers were allowed to travel by them. They stopped at Crathes by signal, but did not stop regularly for setting down or taking up passengers. There was no contract with the Home Office or Post Office that they should not do so.—A. sought declarator that all trains, including the above, except only such as might be hired for an individual or individuals for his or their exclusive use, should regularly stop:—*Held*, reversing the decision of the Court below, that the trains called the Queen's messenger trains, and the Post Office trains, fell within the terms of the contract; but, agreeing with the decision of the Court below, that the excursion trains in the circumstances materially differed from ordinary passenger trains and did not come within the obligation. Burnett *v.* Great North of Scotland Railway Company - - - - - - 147

10. —— *Superior and Vassal—Irritancy ob non solutum canonem—Statute* 1597, *c.* 250—*Extinction of Sub-feu held under defaulting Vassal—Right of Sub-feuar to purge the Irritancy.*] An action of declarator of tinsel of a feu ob non solutum canonem is an irredeemable adjudication of the feu in favour of the superior; but the subfeuar can protect himself from eviction by paying the superior's full preferable debt, and when he does so he has a claim of relief pro ratâ against all the owners of the land on which the debt is

SCOTCH LAW—*continued.*

charged.—It is provided by the Scotch Statute 1597, c. 250, that the vassal shall lose the feu of his lands by his failure to pay the feu duty for two years together, in like manner as if an irritant clause to that effect had existed in his feu contract.—By feu contract A. disponed in feu farm to B. and C. five acres of building land, with an annual reddendo of £480. The contract of feu contained the express declaration "that in case at any time two years' feu duty shall be fully resting, owing and unpaid together, then this present feu right, and all that may follow hereon, shall, in the option of the superior, become void and null. B. and C. divided the lands between them, and each granted, inter alia, sub-feus (narrating in the deeds conveying the land the above-mentioned feu contract) of portions of the five acres to D. and E. respectively.—Upwards of four years' feu duties became due. A. raised an action of declarator of irritancy ob non solutum canonem. D. and E. contended that the irritancy must be confined to the mid-superiorities created by B. and C. and had no effect on the portions of land sub-fued on their tendering the sub-feu duty reserved on each:—*Held*, reversing the decision appealed from, but affirming *Cassels* v. *Lamb* (12 Court Sess. Cas. 4th Series, 722), that the superior's right was not merely a charge upon the mid-superiorities, but a right to annul the charter of his feuars and all sub-feus made by them, to the effect of resuming the full beneficial possession of the lands feued.—*Held*, also, that the circumstances did not warrant the conclusion that the superior had consented to the sub-infeudation. SANDEMAN *v.* SCOTTISH PROPERTY SOCIETY 553

SCOTCH STATUTE, 1597, c. 250 - - 553
See SCOTCH LAW. 10.

SCOTLAND—Bastardy summons—Service of 45
See BASTARDY.

SERVICE—Bastardy summons—Scotland 45
See BASTARDY.

SETTLEMENT—*Covenant to settle Property to which Wife or Husband in her Right "shall become entitled."*] In a settlement made before marriage there was an agreement to settle upon certain trusts all real and personal property to which the wife or the husband "in her right at any time during her now intended coverture shall become entitled (except jewels and" certain other articles "which it is hereby declared shall belong to" the wife "for her separate use)." The trusts included a power of sale, the moneys arising from the sale to be held upon the trusts agreed and declared concerning such part of the personal estate of or to which the wife "now is or she or" the husband "in her right shall become possessed or entitled as aforesaid":—*Held*, affirming the decision of the Court of Appeal, that on the true construction of the agreement, read in conjunction with the context, it included property to which the wife was entitled before marriage; and therefore that jewels given to the wife before marriage were within the exception and belonged to the wife for her separate use. WILLIAMS *v.* MERCIER 1

2. —— *Vested Interest—"Payable" meaning "vested"—Shares "to be paid" at twenty-one—Gift over on Death before Share "payable."*] By

SETTLEMENT—*continued.*

a marriage settlement lands were conveyed upon trust for husband and wife successively for life, and after the death of the survivor, "to levy out of the said lands and premises . . . . the sum of £3000 . . . . to be divided to and among all the children of the said intended marriage, save and except such child and children as under the limitations aforesaid shall succeed to the enjoyment of the lands and premises hereby conveyed . . . . in equal shares and proportions as tenants in common and not as joint tenants, the share of such child or children as shall be a son or sons to be paid to him or them upon his or their respectively arriving at the full age of twenty-one years, and the share or shares of such of them as shall be daughters to be paid upon their respectively arriving at their full age of twenty-one years, or day or days of marriage, whichever shall first happen: Provided always that such marriage during minority shall be had by and with the consent and approbation of" the parents "or the survivor of them: with interest for the same by way of maintenance at the rate of £6 by the hundred to be computed from the day of the death of the survivor of" the parents: "with benefit of survivorship to the survivors or survivor of such children if any of such children shall die before his, her, or their share or shares shall become payable unmarried and without leaving issue as aforesaid, it being the true intent and meaning of these presents that none of the children of the said intended marriage, who under the limitations herein contained shall become entitled to an estate in possession in any part of the lands and premises hereby conveyed . . . . shall be entitled to any part of" the said sum.—A son attained twenty-one and died in the lifetime of his father:—*Held*, affirming the decision of the Court of Appeal in Ireland, that there being no words indicating a clear intention to make the vesting of children's shares contingent on their surviving both parents, the rule laid down in *Emperor* v. *Rolfe* (1 Ves. Sen. 208) applied, and the son took a vested interest in his share on attaining twenty-one. WAKEFIELD *v.* MAFFET - - - - - 422

SHERIFF—Sale of fixed machinery—Law of Lower Canada - - - 643
See CANADA, LAW OF. 4.

SHIP—*Insurance, Marine—General Average—Expenses of reshipping Cargo and of Ship leaving Port of Refuge.*] A ship on a voyage having sprung a dangerous leak, the captain, acting justifiably for the safety of the whole adventure, put into a port of refuge to repair. In port the cargo was reasonably, and with a view to the common safety of ship, cargo, and freight, landed in order to repair the ship. The ship was repaired, the cargo reloaded and the voyage completed:—*Held*, affirming the decision of the Court of Appeal, that the cargo owners were not chargeable with a general average contribution in respect of the expenses of reshipping the cargo.—*Attwood* v. *Sellar* (4 Q. B. D. 342; 5 Q. B. D. 286) discussed. SVENDSEN *v.* WALLACE - - 404

2. —— *General Average Loss—Liability of Cargo Owner for General Average Contribution.*] When ship and cargo are in peril, the fact that

SHIP—*continued.*
the shipowners have by the act of the master become bound to pay and have paid a sum of money for preservation of ship and cargo, and that the master in so binding them pursued a reasonable course under the circumstances, is not conclusive that the whole sum was chargeable to general average so as to bind the cargo owners to pay their proportion.—The decision of the Court of Appeal reversed and a new trial ordered on the ground that the question of the amount chargeable to general average ought to have been submitted to the jury. Anderson *v.* Ocean Steamship Company - - - - 107

3. —— *Indorsee of Bill of Lading—"Passing of property" in Goods shipped—Indorsement by way of Pledge—Bills of Lading Act* (18 & 19 *Vict. c.* 111) *s.* 1.] The mere indorsement and delivery of a bill of lading by way of pledge for a loan does not pass "the property in the goods" to the indorsee, so as to transfer to him all liabilities in respect of the goods within the meaning of the Bills of Lading Act (18 & 19 Vict. c. 111) s. 1.—Goods were shipped to a foreign port under bills of lading making the goods deliverable to the shipper or assigns. After the goods had arrived and been warehoused the shipper indorsed the bills of lading in blank and deposited them with the indorsees as security for a loan. The indorsees never took possession of or dealt with the goods:—*Held*, reversing the judgment of the Court of Appeal, and restoring the judgment of Field, J., that "the property" in the goods did not "pass" to the indorsees within the meaning of the Bills of Lading Act so as to make them liable in an action by the shipowner for the freight. Sewell *v.* Burdick - - - - 74

4. —— *Navigation—Collision—Negligence—Rule* 34, *c.* 2, *of the Danube Commission Rules.*] Under Rule 34, Chapter II. of the Danube Commission Rules, vessels going down the Danube should keep to the right bank.—Where a vessel going down the Danube, when there was a fog and approaching night, went to the left bank, *held*, that, according to the true construction of the rule, that was neglect of duty; and that such negligence was the cause of a collision which occurred with a vessel coming up, although the absence of lights on the latter vessel might have partly contributed to the accident. "Youri" Russian SS. *v.* "Spearman" British SS. 276

—— Insurance - - - - 263
See Insurance, Marine.

—— Jurisdiction of Admiralty Division—Lord Campbell's Act - - - 59
See Practice. 1.

SLANDER—Law of New South Wales - 279
See New South Wales, Law of. 1.

SOLICITOR—Law of Victoria—Order to deliver bill - - - - - 300
See Victoria, Law of.

SPANISH LAW—Trinidad - - - 312
See Trinidad, Law of.

STATUTES:—
21 Jac. 1, c. 16—*Limitations* - - 279
See New South Wales, Law of. 1.
6 Anne, c. 11, art. 19—*Treaty of Union* 453
See Scotch Law. 1.

STATUTES—*continued.*
3 & 4 Will. 4, c. 27, ss. 1, 2, 29—*Limitations*
See Limitations, Statute of. [14
1 & 2 Vict. c. 109—*Tithes, Ireland* - 14
See Limitations, Statute of.
5 & 6 Vict. c. 35, s. 54—*Income Tax* - 438
See Income Tax.
5 & 6 Vict. c. 39, ss. 3, 7—*Factors* - 617
See Factor.
9 & 10 Vict. c. 93—*Lord Campbell's Act* 59
See Practice. 1.
10 & 11 Vict. c. 34, s. 53—*Towns Improvement*
See Local Government Acts. [364
15 & 16 Vict. c. 83—*Patent* - - 249
See Patent.
18 & 19 Vict. c. 111, s. 1—*Bill of Lading* 74
See Ship. 3.
21 & 22 Vict. c. 56, s. 12—*Confirmation and Probate* - - - - 453
See Scotch Law. 1.
24 & 25 Vict. c. 10—*Admiralty* - - 59
See Practice. 1.
25 & 26 Vict. c. 102—*Metropolis Management Act* - - - - - 229
See Metropolis Management Act.
32 & 33 Vict. c. 56—*Endowed Schools* - 304
See Endowed Schools Act.
35 & 36 Vict. c. 65—*Bastardy* - - 45
See Bastardy.
36 & 37 Vict. c. 87—*Endowed Schools* - 304
See Endowed Schools Act.
44 & 45 Vict. c. 24, ss. 4, 6—*Summary Jurisdiction* - - - - 141
See Bastardy.

STATUTES, COLONIAL:—
43 Vict. c. 25—*Canada* - - - 675
See Practice. 3.
43 & 44 Vict. c. 9—*Quebec* - - 141
See Canada, Law of. 1.

STREET—Paving expenses - - - 364
See Local Government Acts.

SUB-FEU—Held under defaulting vassal - 553
See Scotch Law. 10.

SUMMONS—Bastardy—Service in Scotland 45
See Bastardy.

SUPERIOR AND VASSAL - - - 553
See Scotch Law. 10.

TITHE RENT-CHARGE—Ireland—Statute of Limitations - - - - 14
See Limitations, Statute of.

TOWAGE—General average loss - - 107
See Ship. 2.

TRINIDAD, LAW OF—*Status of Children born before Marriage—Law of Inheritance—Ordinance No.* 24 *of* 1845, *s.* 5, *and No.* 7 *of* 1858, *s.* 7.] According to the Spanish laws originally in force in Trinidad, children born before marriage (contracted before the 12th of March, 1846), have the same rights of inheritance from their father and mother as children born after marriage.—Sect. 12 of Ordinance No. 24 of 1845, while preventing marriage after that date from legitimating the ante nati children, does not take away

TRINIDAD, LAW OF—*continued.*
the status of legitimacy previously acquired.—Where a mother married before that date, died intestate in 1862, leaving seven children, three of whom were ante nati and four post nati, *held*, that each by inheritance took one seventh of the estate which she had acquired by purchase under sect. 5 of No. 24 of 1845.—*Held*, with regard to the shares of two ante nati who had died thereafter intestate without issue, that under sect. 5 above cited and sect. 7 of No. 7 of 1858, they were divisible equally amongst the four surviving children, whether ante nati or post nati, and the issue of a deceased daughter. ESCALLIER *v.* ESCALLIER - - - - - - 312

ULTRA VIRES ACT—Building society—Bond of corroboration - - - 119
See SCOTCH LAW. 2.
—— Canadian law—Power of provincial legislature - - - - 141
See CANADA, LAW OF. 1.
—— Corporation - - - - 354
See CORPORATION.

VASSAL—Defaulting - - - 553
See SCOTCH LAW. 10.

VESTING—Settlement—"Payable" - 422
See SETTLEMENT. 2.

VICTORIA, LAW OF—*Victorian Common Law Procedure Act, s.* 396—*Power of Court to order delivery of Attorney's Bill.*] Under sect. 396 of the Victorian Common Law Procedure Act, the Court has power to order delivery of his bill by an attorney, whether or not it has been paid, and whether or not it is one which it would have jurisdiction to refer to taxation. DUFFET *v.* MCEVOY - - - - - - 300

WATERCOURSE—Prescription—Roman-Dutch law - - - - - 336
See CAPE OF GOOD HOPE, LAW OF.
WINDING-UP—Building society—Priority of members - - - - 33
See BUILDING SOCIETY.
WITHDRAWAL OF MEMBERS—Building society - - - - - 33
See BUILDING SOCIETY.
WORDS—"Annual profits or gains" - 438
See INCOME TAX.
—— "Payable" - - - - 422
See SETTLEMENT. 2.
—— "Shall become entitled" - - 1
See SETTLEMENT. 1.

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